85-1166

Supreme Court, U.S.
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IN THE

Supreme Court of the United States

JANUARY TERM, 1986

W. W. TAYLOR AND SOUTHWEST MORTGAGE SERVICE CORP.,
Petitioner

vs.

MICHAEL F. PEZZULLI,
Respondent

FEDERAL HOME LOAN BANK BOARD,
FEDERAL SAVINGS AND LOAN INSURANCE
CORPORATION, WILLIAM CHURCHILL,
LEONARD F. MCMANAMAN, WILLIAM CAPSHAW,
GARY ADAMS, DOROTHY NICHOLS, ROSEMARY STEWART,
L.L. BOWMAN, E. FRANK HALL
T.L. WELKER, SNIDER CAMPBELL,
CHRISTINA CHAVEZ, HAROLD DOUGLAS,
RAYMOND D. CHAVEZ, ANDREW SWARTHOUT,
DAVID W. BONEM, ROBERT WALLACE, JOHN MCKINZIE,
PAUL BARDACKE, ELLEN SOUBERMAN, FRED SMITH
SUN COUNTRY SAVINGS BANK, LOS CRUCES, NEW MEXICO,
HI-PLAINS SAVINGS AND LOAN ASSOCIATION,
HEREFORD, TEXAS
AND JOHN DOES AND JANE DOES NUMBERED ONE
THROUGH FIFTY
Other Defendants

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Whether the District Court may stay all of the petitioners' discovery and require petitioners to come forward with affidavits to meet or overcome the self-serving affidavit of the movant, conduct no evidentiary hearing and rule on motions for summary judgment without gross abuse of discretion and denial of due process and whether the District Court and the Court of Appeals can appropriately require petitioners to file a FRCivP, Rule 56(f) affidavit in the face of repeated stays of all of petitioners' attempted discovery, including the deposition of the movant (petitioners managed to take one deposition); motions to stay disposition of such dispositive motions; and petitioners' stated need for discovery to meet the summary judgment motions in their pleadings and whether there were genuine material factual issues in dispute which rendered summary judgment in favor of respondent inappropriate?

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ANDREW SWARTHOUT,
DAVID W. BONEM, ROBERT WALLACE,
JOHN MCKINZIE,
PAUL BARDACKE, ELLEN SOUBERMAN,
FRED SMITH,
SUN COUNTRY SAVINGS BANK, Los Cruces,
New Mexico, HI-PLAINS SAVINGS AND LOAN ASSOCIATION,
Hereford, Texas and JOHN DOES and JANE DOES
numbered one through fifty,
Other Defendants.

PETITION FOR WRIT OF CERTIORARI

OPINIONS BELOW

The opinions of the District Court for the Northern District of Texas is not reported and is attached as Appendices IX and X. The opinion of the Court of Appeals for the Fifth Circuit is not reported and is attached as Appendix I. The Motion for Rehearing was denied and is attached as Appendix II.

JURISDICTION

The judgments of the Court of Appeals for the Fifth Circuit were made and entered on July 1, 1985 and August 16, 1985, respectively and copies thereof are appended to this petition in the Appendix. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATUTES, FEDERAL RULES, AND REGULATIONS INVOLVED

The pertinent portions of 28 USC 1343, 42 USC 1981, 1983 and 1985 and Rule 56, Fed. R.Civ.P. are quoted, infra.

STATEMENT CONCERNING CORPORATE AFFILIATIONS OF SOUTHWEST MORTGAGE SERVICE CORP., HI-PLAINS SAVINGS AND LOAN ASSOCIATION AND SUN COUNTRY SAVINGS BANK, FEDERAL HOME LOAN BANK BOARD AND FEDERAL SAVINGS AND LOAN INSURANCE CORPORATION

Southwest Mortgage Service Corp., Dallas, Texas is a corporation organized and existing under the laws of the state of Texas. Said corporation is not a parent company and has no subsidiaries or affiliates.

Hi-Plains Savings and Loan Association, Hereford, Texas is a corporation organized and existing under the laws of the State of Texas and was during all times pertinent hereto,

insured by the Federal Savings and Loan Insurance Corporation, and is a member of Home Loan Bank of Dallas, Texas. Said corporation is not a parent company and has no subsidiaries or affiliates known to petitioners other than those named above.

Sun Country Savings Bank, Los Cruces, New Mexico is a corporation organized and existing under the laws of the State of New Mexico and was during all times pertinent hereto, insured by the Federal Savings and Loan Insurance Corporation, is a member of Home Loan Bank of Dallas, Texas, and may be affiliated with Coronado Savings and Loan Association, Albuquerque, New Mexico. Said corporation is not a parent company and has no subsidiaries or affiliates known to petitioners other than those named above.

Federal Home Loan Bank Board is an agency of the United States government and is the operating head of the Federal Savings and Loan Insurance Corporation, which in turn is a federally chartered corporation organized and existing under the laws of the United States of America. Federal Home Loan Bank Board has also organized the Home Loan Bank of Dallas, Texas and the other Home Loan Banks existing in the various districts in the United States.

STATEMENTS

This action was commenced by petitioners, W. W. Taylor and Southwest Mortgage Service Corp. by the filing of a Pro se Complaint against the above stated defendants on the 16th day of April, 1984 in the United States District Court for the Northern District of Texas, asserting in three Counts, numerous violations of their civil rights and charging the defendants and each of them, with conspiring to deny petitioners' civil rights. While respondent Pezzulli, by virtue of his participation in the conspiracy, charged in the entire Complaint, his overt

acts and his complicity in the conspiracy is specifically set forth in Count II, and became the focal point of respondent's summary judgment motions, therefore, Count II of the Complaint is set forth in detail as Appendix III.

Petitioners sought to effect service on respondent Pezzulli, an attorney, by use of an Acknowledgement of Service form provided for by FRCivP, Rule 4 and delivered it by Certified mail, Return Receipt requested. Pezzulli failed to return the Acknowledgment of Service, but did file an answer on behalf of his client Hi-Plains Savings and Loan Association, who is also a defendant herein, on May 17, 1984 and on the same date filed a notice to take petitioner Taylor's deposition. On May 30, 1984, petitioners, Pro se, filed their motion for Default Judgment asserting that since Pezzulli was an Officer of the Court he was obligated to sign and return the Acknowledgement of Service form and petitioners attached the Post Office Return Card whereon Pezzulli signed acknowledging receipt of the envelope containing the Complaint, Summons and Acknowledgement of Service form. The District Court denied the Motion for Default Judgment on June 4, 1984.

Thereupon, petitioners applied to the Court of Appeals for the Fifth Circuit for a Writ of Mandamus to compel the District Court to grant the Default Judgment. The Fifth Circuit denied the Writ. Petitioner thereafter, caused a Summons and Complaint to be served on Pezzulli.

On June 8, 1984, respondent Pezzulli filed his Original Answer. On June 11, 1984, petitioners filed an Affidavit of Prejudice, seeking the voluntary or involuntary recusal of the District Judge. The District Judge, treating the Affidavit as a Motion for Recusal, denied the Application on June 13, 1985. Whereupon, petitioners, still acting Pro se, again applied to the Court of Appeals for the Fifth Circuit for a Writ of Mandamus to require the District Judge to recuse himself. The

Fifth Circuit Court of Appeals again denied petitioners' petition and castigated petitioners for what it deemed to be a second frivilous attempt to invoke the jurisdiction of that Court.

On June 20, 1984, Hi-Plains filed Notice of Deposition of Gerald Stool and Steve Smith and said depositions were taken on June 28, 1984, notwithstanding petitioners' Motion for Protective Order concerning the deposition of Gerald Stool. Petitioners' Motion for Protective Order was ruled to be moot by the Magistrate on August 1, 1984 because the deposition had already been taken.

On July 2, 1984, Dorothy Palumbo entered her appearance as attorney of record for petitioners.

On July 12, 1984, petitioners filed and served their Notice to take the deposition on Gary Adams, an Examiner for Federal Home Loan Bank Board, and caused a Subpoena Duces Tecum to be served on him.

On July 25, 1984, defendants Federal Home Loan Bank Board, (FHLBB) Federal Savings and Loan Insurance Corporation, (FSLIC) William Churchill, Leonard F. McManaman, William Capshaw, Gary Adams, Dorothy Nichols and Rosemary Stewart filed a Motion For Protective Order To Stay Discovery, To Quash Deposition Notice and Subpoena Duces Tecum And For Expedited Consideration And Relief And Brief In Support Thereof. On July 30, 1984, the District Judge granted said motion and ordered all discovery stayed until after said defendants' motions, under Rule 12 FRCP, had been filed and ruled upon by the Court and further quashed petitioners' notice to take the deposition of Gary Adams and petitioners' Subpoena Duces Tecum.

The Magistrate, as a part of his discovery orders of August 1, 1984, concluded that the District Court had stayed all

discovery by its order of July 30, 1984. On appeal, the District Court set aside the Magistrate's interpretation of the stay of all discovery order, holding that the order stayed discovery to the federal defendants only. However, the District Court affirmed the Magistrate's order denying petitioners the deposition of Charles Schmidt.

On August 16, 1984, respondent Pezzulli, along with defendants Welker and Hi-Plains, filed motions and memorandum to dismiss paragraphs 38, 40, 43, 44, 45, 46, 47, 50, 51, and 52 of petitioners' Complaint for lack of subject matter jurisdiction over pendent claims and for partial summary judgment on paragraphs 46 and 47 of petitioners' Complaint with the affidavits of Welker and respondent Pezzulli in support thereof. (Appendix IV) On August 20, 1984, respondent Pezzulli, along with defendants Welker and Hi-Plains, filed a motion and memorandum in support for summary judgment on the petitioners' Complaint, except for paragraphs 46 and 47 thereof. (Appendix V)

After the filing of the motions for summary judgment, petitioners noticed the depositions of defendants Pezzulli, Welker, Raymond Chavez, Christina Chavez, Hall, Bowman and non-parties, Joy Bunch, an employee of Hi-Plains, and Main Hurdman or its designee. All these depositions were stayed by the Magistrate pending the completion of the deposition of petitioner Taylor which deposition, after numerous all day sessions, is still not completed by defendants. The Magistrate did order several defendants, who were non-residents of the state of Texas, to answer interrogatories submitted to them by the petitioners, but said defendants never answered them for the reason that the District Court had dismissed them from the case citing lack of proof of sufficient contact with the state of Texas to create long arm jurisdiction notwithstanding petitioners' allegations of conspiracy and conspiratal acts occuring within the state of Texas. Petitioners appealed these orders of

the Magistrate relating to staying the depositions to the District Court but such appeal was denied.

The District Court has now dismissed all defendants who are nonresidents of the state of Texas from the case except those employed by the FHLBB or FSLIC.

On September 5, 1984, petitioners filed their Response to Respondents' Motions to Dismiss; for summary judgment on paragraphs 46 and 47; and for summary judgment on petitioners' Complaint, except paragraphs 46 and 47. To this response is attached petitioner Taylor's affidavit based on personal knowledge verifying the allegations contained in the complaint. (Appendix VI)

On November 2, 1984, petitioners filed a motion to stay disposition of pending motions to dismiss until after full discovery is permited and completed, (Appendix VII) which was denied on January 3, 1985. (Appendix VIII)

On January 7, 1985, the District Court granted respondent Pezzulli's motion for summary judgment on paragraphs 46 and 47 of petitioners' Complaint (Appendix IX) and on January 18, 1985, entered a Memorandum Order (Appendix X) granting respondent Pezzulli judgment on petitioners' Complaint and dismissed petitioners claims against respondent Pezzulli on their merits.

Petitioners' filed their Notice of Appeal to the Fifth Circuit Court of Appeals on January 29, 1985 and thereafter, on the 4th day of February, 1985, filed an Amended Notice of Appeal from (1) the final judgment entered January 18, 1985; (2) the Memorandum Order dated January 18, 1985; (3) the Memorandum Order dated January 7, 1985; and (4) the Order dated January 3, 1985 and thereafter perfected their appeal.

EXISTENCE OF JURISDICTION BELOW

The United States District Court for the Northern District of Texas had jurisdiction pursuant to 28 USC 1343 since the action was brought under 42 USC 1981, 1983, and 1985 for deprivation of petitioners' civil rights.

The Court of Appeals for the Fifth Circuit had jurisdiction pursuant to 28 USC 1291, the Northern District of Texas being within the boundaries of that circuit.

NECESSITY FOR CERTIORARI

It is submitted that Certiorari should be granted in matters involving substantial issues of Constitutional dimension. The abuse of discretion by the lower courts in denying petitioners virtually any discovery (one deposition, taken in Washington, D.C.) while allowing the movant discovery from petitioners and requiring petitioners to produce affidavits concerning facts of a conspiracy among the defendants to overcome the self-serving affidavit of movant, when such facts and documentation is held largely in the hands of the defendant conspirators, rises to the level of denial of due process.

It is further submitted that Certiorari should be granted in matters where there is a conflict among the Circuits, as there appears to be here, on the effect of denial of discovery to non-moving parties and the necessity for the parties to make a Rule 56(f) affidavit, when repeated attempts to obtain discovery have been met by the District Court's stay orders and where the non-moving party has formally moved the District Court to stay disposition of the motions pending discovery.

This Court should grant Certiorari and further delineate the discovery rules where a single plaintiff or two seek redress against governmental agencies and employees and persons acting in concert with them for deprivation of civil rights.

There is an inherent evil in a judicial system when governmental agencies and corporations, their employees and persons acting in concert with them, having virtually complete control over all pertinent evidence can make a self-serving affidavit saying only that the movant did not do the things that non-movant alleges he did, and thereby prevail on summary judgment, unless the non-movant is fortunate enough to have independent proof of the conspiracy or knowledge of the acts and agreements of the conspiracy which the courts will consider to be personal knowledge as used in Rule 56.

Such a system is totalitarian and there are no civil or constitutional rights or they are meaningless.

ARGUMENT AND AUTHORITIES

1. Whether the District Court may stay all of petitioners' discovery and require petitioners to come forward with affidavits to meet or overcome the self-serving affidavit of the movant, conduct no evidentiary hearing and rule on motions for summary judgment without gross abuse of discretion and denial of due process and whether the District Court and the Court of Appeals can appropriately require petitioners to file a FRCivP, Rule 56(f) affidavit in the face of repeated stays of all of petitioners' attempted discovery, including the deposition of the movant; (petitioners managed to take one deposition) motions to stay disposition of such dispositive motions; and petitioners' stated need for discovery to meet the summary judgment motions in their pleadings and whether there were genuine material factual issues in dispute which rendered summary judgment in favor of respondent inappropriate?

As hereinbefore indicated, respondent filed a motion to dismiss and two separate motions for summary judgment. In support of the motion for summary judgment, respondent

offered his own affidavit which essentially stated that he did not do each of the specific acts which petitioner charged him with responsibility for commiting or causing them to be commited.

Petitioners were attempting to obtain discovery by way of interrogatories and depositions. Petitioners' initial attempt was to take the deposition of defendant Adams. This was met with the U. S. Attorney's motion for protective order. The U. S. Attorney's office was representing the FHLBB, the FSLIC, and their employees. Adams was an Examiner for FHLBB and was alleged by petitioners to be one of the participants in the conspiracy, with respondent Pezzulli, to deprive petitioners of certain property and contract rights. The District Court granted the motion and stayed all petitioners' discovery and in particular the FHLBB, the FSLIC, and any defendants employed by either organization. Initially, the Magistrate interpreted this ruling of the District Court as a complete stay of all discovery and so ordered. The District Court subsequently ruled that it intended to stay discovery only against the FHLBB, the FSLIC and their employees upon the appeal of respondent.

Petitioners set up an extensive deposition schedule, including respondent, defendants Hall, Bowman, Welker, the nonresident defendants and numerous other defendants and nonparties. Protective orders were sought by defendants, and were granted by the Magistrate, giving as his reason that discovery should be orderly, in that defendants should be permitted to complete their discovery from petitioners (Taylor's deposition) to determine the parameters of the lawsuit, before petitioners should be permitted to proceed with their discovery schedule. During the course of these various motions and discovery orders, petitioners were able to obtain the deposition of one Gary Terry in Washington, D. C. in Novem-

ber of 1984, but were able to obtain no other discovery prior to the order granting these summary judgments.

Appendix VII, attached hereto, demonstrates that petitioners filed a motion to stay disposition of motions until discovery could be had and also advised the District Court in their pleadings that discovery was needed. When no relief could be had, petitioner Taylor filed, with his Response, his affidavit which stated on personal knowledge that the allegations in the Complaint were true.

Prior to filing the motion for summary judgment on paragraphs 46 and 47 of the Complaint, respondent noticed the depositions of Gerald Stool and Steve Smith. Petitioners filed their motion for protective order on the Stool deposition, but notwithstanding the pending motion, respondent took the deposition. The Magistrate ruled that petitioners' motion for protective order was moot, since the depositions had already been taken.

On September 5, 1984, petitioners responded to the motions for summary judgment, claiming that consideration of the motions without discovery was premature and highly irregular. Nonetheless, the District Court, with the record before it in this state, rendered the summary judgments. This denies petitioners due process.

The Fifth Circuit denied petitioners' appeal, citing petitioners failure to file an affidavit under Rule 56(f) stating that their discovery had been cut off and citing their need for further discovery to meet the standards imposed by Rule 56(e) and setting out precisely the evidence that discovery would produce.

It seems incredulous that petitioners would be required to make an affidavit to the District Court that it, and its Magistrate, had cut off the discovery, especially since those relevant orders of the Magistrate had been appealed to the District Court who affirmed the stay of petitioners' discovery.

The Fifth Circuit has not always assumed this stance in this area. *John v. Louisiana Board of Trustees for State Colleges, et al.*, 757 F.2d 698 (5th Cir. 1985). In the *John* case the Fifth Circuit took the position that even where the parties had agreed at pretrial that the matter should be submitted on the evidence taken at the injunction hearing and after plaintiff had taken the deposition of a named person, that the District Court was in error in granting summary judgment where the plaintiff's counsel had advised the Court by letter that it desired to present more evidence before the ruling on summary judgment. This was not an affidavit. The Fifth Circuit went on to say that "Generally, questions of motivations are peculiarly ill-suited to summary resolution." Still later in the opinion, the Court stated "The moving party still has the initial burden, under Rule 56(c), of showing the absence of a genuine issue concerning any material fact, and of showing that judgment is warranted as a matter of law. In deciding whether to grant summary judgment, the District Court must draw inferences most favorable to the party opposing the motion, and take care that no party will be improperly deprived of a trial of disputed factual issues." The case was also reversed on other grounds, but the law announced is equally applicable here. Respondent's self-serving affidavit saying that he did not do what the Complaint alleged he did, did not rise to the level necessary to support summary judgment, in light of the denial of discovery, and that the evidence to overcome his affidavit was in respondent's hands and in the hands of the other defendants. Further, the Fifth Circuit made no requirement for an affidavit from the nonmoving party. See also: *Smith v. Community Federal Savings and Loan*, 77 F.R.D. 668 (D.C. Miss., 1977) and *Walters v. City of Ocean Springs*, 626 F.2d 1317 (5th Cir., 1980); Wright, Miller and Kane, *Federal Practice and Procedure* @ 2741, p. 545.

The Tenth Circuit, in *Brown v. Parker-Hannifin Corporation*, 746 F.2d 1407, (10th Cir. 1984) observed: "The party seeking summary judgment 'had the burden of showing the absence of a genuine issue as to any material fact, and for these purposes the material it lodged must be viewed in the light most favorable to the opposing party.' *Adickes v. Kress & Co.*, 398 U.S. 144, 157 (1970). The moving party must 'demonstrate entitlement beyond a reasonable doubt and if an inference can be deduced from the facts whereby the non-movant might recover, summary judgment is inappropriate.' *Mustang Fuel Corp. v. Youngstown Sheet & Tube Co.*, 516 F.2d 33, 36 (10th Cir. 1975). Where different ultimate inferences may be drawn from the evidence presented by the parties, the case is not one for summary judgment. *United States v. Diebold, Inc.*, 369 U.S. 654, 655 (1962)." Here the Tenth Circuit relied on plaintiff's own deposition which raised some issue of discrimination and thus summary judgment was not appropriate.

The First Circuit has observed in *Hebert, et al., v. Cordelia Wicklund, d/b/a Lake Farm, et al.*, 744 F.2d 218 (1st Cir. 1984), "Many cases state that continuances should be routinely granted under Rule 56(f) where the moving party has sole possession of the relevant facts that the non-moving party needs to oppose the summary judgment motion, e.g., *Ward v. United States*, 471 F.2d 667, 670 (3rd Cir. 1973); *Concord Laboratories, Inc. v. Concord Medical Center*, 552 F. Supp. 549, 554 (N.D. Ill. 1982)..." This is the essence of the present action. Respondent and the other conspiring defendants were in possession of the facts and documents necessary for petitioner to prove the conspiracy, yet, petitioners were allowed essentially no discovery.

The Third Circuit arrived at a similar result in *Hummell, v. Schweiker, Secretary of Health and Human Services*, 736 F.2d 91, (3rd Cir. 1984). "[W]e have said where the facts are in possession of the moving party a continuance of a motion for

summary judgment for purposes of discovery should be granted almost as a matter of course. *Ward v. United States*, 471 F. 2d 667, (3rd Cir 1972) . . . [B]y acting on the motion for summary judgment without argument, and without reference to what might be developed in discovery, which was being diligently pursued, the court erred." In the instant case, petitioners were diligently attempting to pursue discovery but were virtually denied and required to produce evidence by affidavit to overcome respondents' self-serving affidavits.

For the position taken by other circuits on this issue the Court's attention is directed to *Selva & Sons v. Nina Footwear*, 705 F.2d 1316 (Fed. Cir. 1983) wherein the court stated "The bridling devices at issue here sustain and insure the most elementary operation of our civil law. The concepts of notice, admissibility, and opportunity to be heard are ancient primaries.*** However correct the conclusion below may be in the end, we cannot allow the shaving of principles for expediency when those precepts assure order and justice."

A review of the foregoing argument reveals it is readily apparent that the Circuits are in disagreement as to this area of the discovery and summary judgment law, and that the Fifth Circuit at times appears not to agree with its own prior rulings.

Considering that petitioners verified their Complaint, were denied virtually any discovery, and were faced with overcoming the self-serving affidavit of respondent, summary judgment was not proper. Petitioners' verified Complaint was sufficient to raise some issue of material facts. Even if it was not sufficient, petitioners were denied due process by the denial of their repeated efforts to obtain discovery and the insistance that petitioners file an affidavit to advise the Court that it needed discovery to rebut respondent's affidavit is to insist upon the performance of a useless act. The District Court has been properly apprised of this need.

Respondent Pezzulli, now that he has the summary judgment, copies other counsel in on his letters and is copied *in by* other counsel on their letters and pleadings in cases where petitioners are the only common denominator. Appendix XI constitutes petitioners' proof. Had these letters and pleadings been available to Petitioners at the time of summary judgment, petitioners could have used them as evidence of the conspiracy..

CONCLUSION

For the reasons set forth above, it is respectfully submitted that this petition for a Writ of Certiorari should be granted.

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CERTIFICATE OF SERVICE

The undersigned hereby certifies that Petitioners' Writ of Certiorari has been delivered and served on the following:

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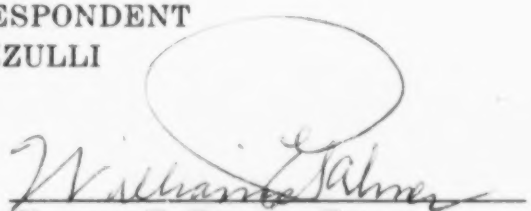

WILLIAM E. PALMER, ESQ.

APPENDIX I

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 85-1067
Summary Calendar

W. W. TAYLOR, AND SOUTHWEST
MORTGAGE SERVICE CORPORATION,
Plaintiffs-Appellants,

versus

FEDERAL SAVINGS AND LOAN INS. CORP., ET AL.,
Defendants,

MICHAEL E. PEZZULLI,
Defendant-Appellee.

Appeals from the United States District Court for the Northern District of Texas

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(July 1, 1985)

Before REAVLEY, POLITZ and HIGGINBOTHAM,
Circuit Judges.
HIGGINBOTHAM, Circuit Judge:**

**Local Rule 47.5 provides: "The publication of opinions that have no precedential value and merely decide particular cases on the basis of well-settled principles of law imposes needless expense on the public and burdens on the legal profession." Pursuant to that Rule, the court has determined that this opinion should not be published.

I

This appeal arises out of a series of business transactions between W. W. Taylor and his company, Southwest Mortgage Service Corporation on one hand and Hi-Plains Savings and Loan Association of Hereford, Texas and State Savings and Loan Association on the other. In April of 1984, Taylor and Southwest Mortgage brought suit in district court seeking over one billion dollars in damages from 75 named and unnamed defendants, including the Federal Home Loan Bank Board, the Federal Savings & Loan Insurance Corporation, a number of their employees, Hi-Plains, and Hi-Plains' attorney, Michael F. Pezzulli, the appellee here. Taylor alleged that these various state and federal regulatory officials conspired with the other defendants to violate his civil rights by severing Taylor's business relations with Hi-Plains.

II

Taylor here appeals the summary judgment granted by the district court in favor of Hi-Plains' attorney, Pezzulli, Fed. R. Civ. P. 54(b). Taylor, in his rambling complaint, sought fifty million dollars in punitive damages from Pezzulli, who allegedly conspired with a Hi-Plains' officer to "harass" and slander Taylor to the detriment of Taylor's business and in violation of Taylor's civil rights.

—A—

The district court initially granted Pezzulli's motion for partial summary judgment on two paragraphs of the complaint on the basis of certain documentary evidence and two depositions which refuted the factual allegations made by Taylor in those paragraphs. Taylor responded by attempting to establish a genuine issue of material fact through an unverified unau-

thenticated letter of one of the deponents and his own affidavit concerning the hearsay statement of that same deponent.

We hold that the district court correctly granted Pezzulli summary judgment as to these paragraphs. Pezzulli presented competent summary judgment evidence controverting the facts alleged by Taylor. Fed. R. civ. P. 56(e). Taylor failed to respond with any "facts as would be *admissible* in evidence" establishing that there indeed was a genuine issue of material fact for trial. Fed. R. Civ. P. 56(e).

—B—

Pezzulli then moved for summary judgment on the remaining claims in Taylor's complaint. Pezzulli supported his motion with his own affidavit denying, in detail, all the allegations against him. Taylor responded with an affidavit of his own stating that "based on his personal knowledge . . . all of the allegations contained in [his] original pro se complaint . . . are true and correct." The district court found that Pezzulli's affidavit properly supported his motion for summary judgment. The court, after carefully reviewing the allegations in each of the paragraphs relevant to Pezzulli, then found that Taylor had failed to adequately rebut Pezzulli's summary judgment evidence. *See* Fed. R. Civ. P. 56(e). All of the allegations in Taylor's complaint, which Taylor, in summary judgment response merely verified, either failed to "set forth specific facts showing there [was] a genuine issue for trial" or were not based on Taylor's "personal knowledge." *See Id.* Summary judgment was thus granted for Pezzulli.

We too have reviewed the summary judgment evidence before the district court, carefully scrutinizing Pezzulli's affidavit and Taylor's verified complaint in response. We agree with the district court that Taylor wholly failed to meet his Rule 56(e) burden of rebutting Pezzulli's competent affidavit

with "significant probative evidence." *Ferguson v. National Broadcasting Co., Inc.*, 584 F.2d 111, 114 (5th Cir. 1978).

Each claim made by Taylor against Pezzulli was undermined by specific facts affirmed in Pezzulli's affidavit. That affidavit might have contained inadmissible evidence does not infect the remaining admissible portions of the document. *Perma Research & Development Co. v. Singer Co.*, 410 F.2d 572, 579 (2d Cir. 1969). Once Pezzulli demonstrated that there was no genuine issue of material fact, Fed. R. Civ. P. 56(c), Taylor was required to "diligently" oppose Pezzulli's motion. *Liberty Leasing Co. v. Hillsum Sales Corp.*, 380 F.2d 1013, 1015 (5th Cir. 1967). Though Taylor verified the allegations of his complaint as "true and correct," *see* Fed. R. Civ. P. 56(e) ("adverse party may not rest upon the mere allegations . . . of his pleading"), "mere general allegations which do not reveal *detailed and precise facts* will not prevent the award of summary judgment." *Liberty Leasing Co.*, 380 F.2d at 1015 (emphasis added). *See also Nicholas Accoustics & Specialty Co. v. H & M Construction Co., Inc.*, 695 F.2d 839, 844 (5th Cir. 1983). Taylor did not have the right to withhold his evidence or choose to wait until trial to develop claims or defenses relevant to the summary judgment motion. *Golden Oil Co., Inc. v. Exxon Co., U.S.A.*,543 F.2d 548, 551 (5th Cir. 1976).

The factual allegations in Taylor's complaint do not "in any way approach the required specificity." *Liberty Leasing Co.*, 380 F.2d at 1015. For example, though Taylor claims that Pezzulli "conspired" to harm him and his company, he does not indicate how or by what acts Pezzulli furthered that conspiracy. Taylor also alleged that Pezzulli "caused to be originated" a television program about Taylor that disseminated "mostly false information" that slandered Taylor and Southwest Mortgage. When Pezzulli swore that he did not know to what television program the complaint referred and that he never caused any such program to be originated, Taylor wholly failed to respond, by

way of discovery or otherwise, with any probative evidence indicating his allegation was in any way genuine. In sum, because Taylor and Southwest Mortgage failed to meet their Rule 56(e) rebuttal burden, summary judgment on the complaint's remaining allegations concerning Pazzulli was proper.

III

On appeal, Taylor claims that the district court abused its discretion when it curtailed discovery by Taylor and Southwest Mortgage and granted summary judgment in favor of Pezzulli in the face of Taylor's outstanding discovery requests. The parties here dispute the extent to which Taylor's discovery was actually curtailed; Pezzulli claims that the main of plaintiffs' discovery requests were either irrelevant or aimed at piercing sacrosanct attorney-client work product generated in a collateral suit by his client, Hi-Plains, against Taylor.

We need not, however, probe the merits of Taylor's discovery requests or the district court's orders relating thereto to dispose of Taylor's claim. Rule 56(f) provides that

> Should it *appear from the affidavits of a party opposing the motion* that he cannot for reasons stated present by affidavit facts essential to justify his opposition, the court may refuse the application for judgment or may order a continuance to permit affidavits to be obtained or depositions to be taken or discovery to be had or may make such order as is just.

(emphasis added). Nowhere in his affidavit in opposition to Pezzulli's summary judgment motion did Taylor indicate that he was foreclosed by discovery order from presenting "facts essential to justify his opposition." "A party seeking the shelter of Rule 56(f) must offer an affidavit explaining to the court why he is unable to make a substantive response as is required by subsection (e) . . . . The nonmovant 'may not sim-

ply rely on vague assertions that additional discovery will produce needed but unspecified facts,' but rather he must specifically demonstrate 'how postponement of a ruling on the motion will enable him, by discovery or other means, to rebut the movant's showing of the absence of a genuine issue of fact.' " *Wallace v. Brownell Pontiac-GMC, Co., Inc.,* 703 F.2d 525, 527 (11th Cir. 1983), *quoting SEC v. Spence & Green Chemical Co.,* 612 F.2d 896, 901 (5th Cir. 1980), *cert. denied,* 449 U.S. 1082 (1981). *See also Thi-Hawaii, Inc. v. First Commerce Financial Corp.,* 627 F.2d 991, 994 (9th Cir. 1980). Though Taylor did file an unsworn "Motion to Stay Disposition of Pending *Motions to Dismiss* Until After Full Discovery is Permitted and Completed," this motion was not the "affidavit" required by Rule 56(f), nor did it set forth any facts of which plaintiffs were deprived for lack of discovery. The district court, therefore, did not abuse his discretion in deciding the motion for summary judgment while discovery in Taylor's entire suit was still pending. *See Wallace,* 703 F.2d at 527.

Nor did the district court err in granting summary judgment in this case without an evidentiary hearing. "While the usual practice of most district courts is to hold oral argument on motions for summary judgment before deciding them, this is not required by Rule 56(c)." *Barker v. Norman,* 651 F.2d 1107, 1119 (5th Cir. 1981). A district court has the discretion to render a summary judgment without hearing if, in view of the summary judgment record, it believes a hearing would be of no use. *See* C. Wright, A. Miller, & M. Kane, *Federal Practice and Procedure: Civil 2d*§ 2720.1 (1983).

The judgment of the district court is thus AFFIRMED.

APPENDIX II

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 85-1067

W. W. TAYLOR, AND SOUTHWEST
MORTGAGE SERVICE CORPORATION,
Plaintiffs-Appellants

versus

FEDERAL SAVINGS AND LOAN INS. CORP., ET AL.,
Defendants,

MICHAEL F. PEZZULLI,
Defendant-Appellee.

Appeal from the United States District Court for the Northern District of Texas

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ON PETITION FOR REHEARING
(August 16, 1985)

Before REAVLEY, POLITZ and HIGGINBOTHAM, Circuit Judges.

PER CURIAM:

IT IS ORDERED that the petition for rehearing filed in the above entitled and numbered cause be and the same is hereby DENIED.

ENTERED FOR THE COURT:

United States Circuit Judge

APPENDIX III

(CAPTION AND COUNT I OMITTED)

COUNT II

41. That the allegations contained in paragraphs numbered one through forty and fifty-four through eighty are incorporated in Count II by this reference, and plaintiffs request that this Court consider this Count II under its Pendant Jurisdiction as well as its Civil Right Jurisdiction.

42. That Defendants WELKER, PEZZULLI and HI-PLAINS, have with a particular malice of their own toward plaintiffs, while acting in concert with all the other defendants, committed a series of tortious acts including, but not limited to the following:

43. Plaintiff, Southwest Mortgage Service Corp. (SMSC), in good faith caused approximately $2.8 million in contract paper to be delivered over to HI-PLAINS for funding under the loan commitment prior to WELKER taking over HI-PLAINS. That immediately after taking over, WELKER directed that these contracts not be funded and has caused them to be embezzled and/or converted to HI-PLAINS and WELKERS use and benefit to the detriment of SMSC and causing Plaintiff to be sued in Nevada by the two developers who had tendered the contracts expecting payment.

44. That PEZZULLI and WELKER made harrassing telephone calls to plaintiffs' Bonding Company and Credit Default Insurance Companies to make untrue allegations about both plaintiffs and made phoney claims against plaintiffs' Credit Default insurer. That the harassment was sufficiently great that plaintiffs' Bond carrier, advised plaintiff that if they received any more of said calls they would cancel the Bond. Said defendants called SMSC's Bonding Agent and ask if they knew they bonded a criminal, with the intention of causing

plaintiffs' bond to be cancelled. They later called back and falsely stated that they were standing alongside an FBI agent who had a warrant for TAYLOR's arrest and they thought the insurance company should know about it.

45. That PEZZULLI and WELKER even traveled to Virginia to harass one of plaintiff insurers by taking a lengthy deposition from them.

46. That PEZZULLI and WELKER called TAYLORS' landlord and falsely told him that TAYLOR had listed the landlords property as an asset on TAYLORS' financial statement.

47. That PEZZULLI and WELKER knowingly lodged a false complaint with the Zoning authorities of the City of Dallas, Texas, causing them to make an investigation to harass plaintiffs, however, the zoning authorities found no violations.

48. That WELKER called the Chairman of the Board of Directors at STATE and falsely stated that plaintiffs' paper, held by STATE, was only worth fifty cents on the dollar; was not insured; that the "Feds" were going to liquidate STATE and that they better sell to him before their stock became worthless, but if they did not want to sell to him they had to quit loaning money to Doc so "we can put Doc out of business", Doc meaning TAYLOR. That these acts violate New Mexico Revised Statute 58-10-93. Slander; felony.

49. That WELKER, after plaintiffs' had turned HI-PLAINS financial fortunes around to the extent it had $6 million in its bank accounts, caused Texas Savings and Loan authorities to put so much pressure on HI-PLAINS former owners that they were forced to sell their stock and WELKER was able to buy all the stock of HI-PLAINS for a mere $750,000.00.

50. WELKER, PEZZULLI and HI-PLAINS contacted all of plaintiffs' customers and tried to get them to do business with them at HI-PLAINS, and attempted to get them to join in a suit to declare plaintiffs insolvent, and encourged, aided and abetted at least two Developers in filing suit against plaintiffs.

51. That PEZULLI, WELKER and HI-PLAINS filed a Civil complaint falsely alleging that plaintiffs were guilty of Organized Criminal Rackteering (RICO) knowing all the time, these allegations were false, and knowing that they had no chance of proving said charges.

52. That PEZZULLI, WELKER and HI-PLAINS, acting individually and as a part of the conspiracy, caused to be originated, with WELKER participating directly in it, a four part Television program titled "Crime Share" which assailed the public with mostly false information about Plaintiffs' and Time Share properties, which was supplied in large measure by said defendants with the intent of damaging plantiffs business reputations and to put plaintiffs out of business as per the numerous threats that WELKER has made to that effect.

53. That these acts described in Count II constitute violations of plaintiffs Civil Rights and are slanderous as well and were done by said defendants, individually and as a part of the conspiracy mentioned in this Complaint.

APPENDIX IV

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF TEXAS
DALLAS DIVISION

W. W. TAYLOR AND SOUTHWEST MORTGAGE SERVICE CORPORATION

vs.

FEDERAL HOME LOAN BANK BOARD, ET AL

Civil Action
Number 3-84-0578-G

JOINT MOTION BY T. L. WELKER, HI-PLAINS SAVINGS AND LOAN ASSOCIATION AND MICHAEL F. PEZZULLI FOR PARTIAL SUMMARY JUDGMENT RE: PARAGRAPHS 46 AND 47 OF COMPLAINT; AFFIDAVIT OF T. L. WELKER; AFFIDAVIT OF MICHAEL F. PEZZULLI; AFFIDAVIT OF STEPHEN E. SMITH AND PAGES 1693-1696 OF THE DALLAS CITY CODE; AND MEMORANDUM IN SUPPORT OF MOTION FOR PARTIAL SUMMARY JUDGMENT

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF TEXAS
DALLAS DIVISION

W. W. TAYLOR AND SOUTHWEST MORTGAGE SERVICE CORPORATION

vs.

FEDERAL HOME LOAN BANK BOARD, ET AL

Civil Action Number CA3-84-0578-G

JOINT MOTION BY T. L. WELKER, HI-PLAINS SAVINGS AND LOAN ASSOCIATION AND MICHAEL F. PEZZULLI FOR PARTIAL SUMMARY JUDGMENT RE: PARAGRAPHS 46 AND 47 OF COMPLAINT

TO THE HONORABLE JUDGE OF SAID COURT:

Defendants T. L. Welker ("Welker"), Hi-Plains Savings and Loan Association ("Hi-Plains"), and Attorney Michael F. Pezzulli ("Pezzulli"), move for partial summary judgment pursuant to Rule 56 of the Federal Rules of Civil Procedure, among other pertinent provisions, as to Paragraph 46 and 47 (contained in Count II) of the "Complaint for Damages for Violation of Plaintiffs' Civil Rights" for the following reasons:

1. It is an undisputed fact that in Paragraph 46 of the Complaint, W. W. Taylor ("Taylor") and Southwest Mortgage Service Corporation ("SMSC") complain as follows:

" 46. That Pezzulli and Welker called Taylors' landlord and falsely told him that Taylor had listed the landlords property as an asset on Taylors' financial statement."

2. It is an undisputed fact that as more fully appears from the entire oral deposition of Gerald Harris Stool, taken June 29, 1984, and filed with the Clerk that the allegations

contained in paragraph 46 of the Complaint as set forth above are not true.

3. It is an undisputed fact that in Paragraph 47 of the Complaint, Taylor and SMSC complain as follows:

> "That Pezzulli and Welker knowingly lodged a false complaint with the zoning authorities of the City of Dallas, Texas, causing them to make an investigation to harass Plaintiffs, however, the zoning authorities found no violations."

4. It is an undisputed fact that as more fully appears from the entire oral deposition of Stephen English Smith, taken June 28, 1984 and filed with the Clerk that the allegations contained in paragraph 47 are not true. Indeed, as more fully appears from the exhibits attached to the oral deposition of Mr. Smith, the zoning authorities did in fact find a violation of zoning by Mr. Taylor and SMSC and Taylor *agreed* to correct that zoning violation. Moreover, it would appear that as a matter of undisputed fact that there is no evidence that the "anonymous complainer" about Taylor's zoning violation was Pezzulli or Welker, Indeed, it appears that if there was a zoning complaint, it was valid and that in fact Taylor and SMSC are currently violating the existing zoning ordinances of the City of Dallas.

5. This motion is based upon the depositions of Stephen English Smith taken June 28, 1984; the deposition of Gerald Stool, taken June 29, 1984; the Affidavit of Stephen English Smith dated the 12th day of July, 1984, attached hereto and marked as MPSJ Exhibit "1"; the Affidavit of T. L. Welker attached hereto and marked as MPSJ Exhibit "2"; and the Affidavit of Michael F. Pezzulli attached hereto and marked as MPSJ Exhibit "3."

6. Based upon all of the foregoing, there are no genuine issues of material fact, and as a matter of law, Defendants Hi-Plains, Welker and Pezzulli are entitled to partial summary judgment with respect to paragraphs 46 and 47 of the Complaint; in light of the allegations in Paragraphs 46 and 47 which are false, H-Plains, Welker, and Pezzulli respectfully request attorney's fees and costs in and about their required defense to paragraphs 46 and 47 of the Complaint and for preparation.

6. Defendants Hi-Plains, Welker and Pezzulli rely upon the Memorandum of Authority which is submitted herewith.

WHEREFORE, Hi-Plains, Welker, and Pezzulli pray for partial summary judgment as to paragraphs 46 and 47 of the Complaint, that they be awarded their costs and attorney's fees, and be granted such other and further relief as may be appropriate.

Respectfully submitted,

MICHAEL F. PEZZULLI, P.C.

/s/ MICHAEL F. PEZZULLI
MICHAEL F. PEZZULLI

/s/ DAVID C. McCUE
DAVID C. McCUE
701 Commerce, Suite 200
Dallas, Texas 75202
(214) 742-4345

Attorney for Defendants
Hi-Plains and Welker

CARRINGTON, COLEMAN, SLOMAN
AND BLUMENTHAL

/s/ CORBET F. BRYANT, JR.
CORBET F. BRYANT, JR.
2500 South Tower
Plaza of the Americas
Dallas, Texas 75201
(214) 698-8000

Attorney for Defendant
Pezzulli

NOTICE OF MOTION

TO: MS. DOROTHY G. PALUMBO, 3905 Turtle Creek Blvd., Dallas, Texas 75219, Attorney for Taylor and SMSC.

Please take notice the undersigned have submitted the attached Motion for Partial Summary Judgment to the Honorable A. Joe Fish, United States District Judge pursuant to Rule 56 of the Federal Rules of Civil Procedure.

/s/ DAVID C. McCUE
DAVID C. MCCUE
Attorney for Defendants
Hi-Plains and Welker

/s/ CORBET F. BRYANT, JR.
CORBET F. BRYANT, JR.
Attorney for Defendant
Pezzulli

CERTIFICATE OF SERVICE

This is to certify that a true and correct copy of the foregoing has this day been mailed by First Class mail to the following:

Ms. Dorothy G. Palumbo
Attorney for Plaintiffs
3905 Turtle Creek Blvd.
Dallas, Texas 75219

Mr. Richard Shore
Attorney for Defendants Fred Smith, John McKenzie, Paul Bardacke, and David W. Bonem

Stradley, Schmidt, Stephens & Wallace
One Campbell Centre
Dallas, Texas 75206

Stafford Hutchison, AUSA
Attorney for Defendants William Churchill, Leonard McManaman, William Capshaw, Gary Adams, Dorothy Nichols and Rosemary Stewart
Office of the United States Atty.
1100 Commerce, Room 16G28
Dallas, Texas 75242

James C. Todd,
Asst. Atty. General
Attorney for Defendants Earl Hall and L. L. Bowman
P.O. Box 12548
Capitol Station
Austin, Texas 78711

SCOTT OLIVER,
KENNETH WAGNER &
RICARDO ORTEGO
Attorneys for Defendants Sun
Country Savings and Ray
Chavez

FRANCHINI, HENDERSON & WAGNER
P.O. Box 1487
Albuquerque, N.M. 87102

CORBET F. BRYANT, JR.
Attorney for Defendant Pezzulli

CARRINGTON, COLEMAN, SLOMAN,
& BLUMENTHAL
2500 South Tower
Plaza of the Americas
Dallas, Texas 75201

all this 16 day of August, 1984.

/s/ DAVID C. McCUE
DAVID C. McCUE

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF TEXAS
DALLAS DIVISION

W. W. TAYLOR AND SOUTHWEST MORTGAGE SERVICE CORPORATION

vs.

FEDERAL HOME LOAN BANK BOARD, ET. AL.
STATE OF TEXAS
COUNTY OF DALLAS

Civil Action Number
CA 3-84-0578-G

AFFIDAVIT

BEFORE ME the undersigned authority on this day personally appeared STEPHEN ENGLISH SMITH, who upon his oath deposed and stated as follows:

"My name is Stephen English Smith. I am the Assistant Director of the Department of Housing and Neighborhood Services. My deposition was taken for the above styled cause on June 28, 1984. The 7.5 residential zone which I referred to in the deposition can be located on pages 1693 — 1696 of the Dallas City Code which is attached hereto and made a part hereof."

/s/ STEPHEN ENGLISH SMITH
STEPHEN ENGLISH SMITH

SUBSCRIBED AND SWORN TO BEFORE ME, on this the 12 day of July, 1984.

/s/
Notary Public In and For
the State of Texas

My Commission Expires:
April 4, 1986

ARTICLE IV
ZONING REGULATIONS

Division 51-4.100:
Establishment of Zoning Districts

Sec. 51-4.101. Zoning Districts Established.

In order to carry out the purposes of this chapter, the city is divided into the following districts:

(1) **Residential Districts.**

(A)	R-1	Single family district 1 acre.
(B)	R-½	Single family district ½ acre.
(C)	R-16	Single family district 16,000 square feet.
(D)	R-13	Single family district 13,000 square feet.
(E)	R-10	Single family district 10,000 square feet.
(F)	R-7.5	Single family district 7,500 square feet.
(G)	R-5	Single family district 5,000 square feet.
(H)	D	Duplex district.
(I)	TH-1	Townhouse district 1.
(J)	TH-2	Townhouse district 2.
(K)	TH-3	Townhouse district 3.
(L)	TH-4	Townhouse district 4.
(M)	MF-1	Multiple-family district 1.
(N)	MF-2	Multiple-family district 2.

(O)	MF-3	Multiple-family district 3.
(P)	MF-4	Multiple-family district 4.
(Q)	MH	Mobile home district.
(R)	A	Agricultural district.

(2) **Nonresidential Districts.**

(A)	O-1	Office district 1.
(B)	O-2	Office district 2.
(C)	NS	Neighborhood service district.
(D)	SC	Shopping center district.
(E)	GR	General retail district.
(F)	LC	Light commercial district.
(G)	HC	Heavy commercial district.
(H)	CA-1	Central area district 1.
(I)	CA-2	Central area district 2.
(J)	I-1	Industrial district 1.
(K)	I-2	Industrial district 2.
(L)	I-3	Industrial district 3.

(3) **Special Purpose District.**

(A)	PD	Planned development district.
(B)	P	Parking district.

(4) **Overlay Districts.**

(A)	H suffix	Historic landmark overlay district
(B)	ID suffix	Institutional overlay district
(C)	D suffix	Liquor control overlay district.

(D)	RP suffix	Restricted parking overlay district.
(E)	CP suffix	Core pedestrian precinct overlay district.
(F)	SP suffix	Secondary pedestrian precinct overlay district.
(G)	AF suffix	Airport flight path overlay district
(H)	SUP suffix	Specific use permit

(Ord. 16959)

Sec. 51-4.102. Purpose of Zoning Districts.

(a) *Residential districts.*

(1) R-1 and R-½ Single-Family Districts. There exists in certain parts of the city large areas of single-family residential development on estate type lots of one-half acre to one acre or more in area. This development has been supplied with utilities and other public services based upon an estate type density. To conserve the character and value of buildings and building sites existing in these areas and to provide for the gradual expansion of this residential development in accordance with the need and a comprehensive plan for various types of residential districts, the R-1 and R-½ districts are provided. These districts are intended to be composed of single-family dwellings together with public, denominational and private schools, churches and public park areas to serve the area. The sections designated in the R-1 and R-½ districts are limited in area and are not intended to be subject to major alteration by future amendment except at the fringe of the districts where minor adjustments may become appropriate to permit the reasonable development of vacant tracts or gradual transition from other districts.

(2) R-16, R-13 and R-10 Single-Family Districts. Single-family residential development has taken place on intermediate sized lots in portions of the city in recent years. In order to protect and encourage the continued development of intermediate density with single-family residences in appropriate areas of the city, the R-16, R-13 and R-10 districts are provided. In addition to single-family residences it is intended that churches, public, denominational and private schools and public parks necessary to serve and complement the intermediate density development be permitted. The areas placed in the R-16, R-13 or R-10 districts are generally limited in area and are not intended to be subject to major alteration by future amendment except where changed conditions might justify the action or where minor adjustments in the boundary of a district may be appropriate to secure a reasonable development of the land.

(3) R-7.5 Single-Family District. This district comprises a major portion of the existing single-family dwelling development of the city and is considered to be the proper zoning classification for large areas of the undeveloped land remaining in the city appropriate for single-family dwelling use. This district is intended to be composed of single-family dwellings together with public, denominational and private schools, churches and public parks essential to create basic neighborhood units. Limited portions of these neighborhood units may consist of denser residential zoning classifications which are shown on the zoning district map or which later may be created by amendments to the map.

(4) R-5 Single-Family District. This classification creates a single-family dwelling district which is appropriate in area requirements for moderate value single-family housing development and which, at the same time, provides a reasonable standard of light, air and similar living amenities. It is intended that the R-5 classification be added by amendment in

specific areas where higher density single-family residence development is shown to be appropriate because of existing development and the adequacy of utilities and where redevelopment of substandard areas at increased single-family density is appropriate.

(5) D, Duplex District. Duplex dwellings have long been a recognized form of housing in the city. In order to provide standards which will protect and ecourage the various types of duplex dwellings existing in the city, a duplex dwelling district with minimum area requirements is provided.

(6) TH-1, TH-2, TH-3, TH-4, Townhouse Districts. This classification creates districts that are being recognized as a form of housing in the city, and provide standards which will protect and encourage various types of single-family dwellings in the city. The TH districts are also established in an effort to provide a more dense single-family residential character by providing minimum standards for lot area, yards, lot coverage and lot frontage.

Affidavit of T. L. Welker in Support of Motion for Partial Summary Judgment

The State of Texas }
County of Dallas }

T. L. WELKER, being first duly sworn, deposes and says:

1. I am the same T. L. Welker who has been sued for approximately Fifty Million Dollars ($50,000,000.00) by W. W. Taylor and Southwest Mortgage Service Corporation in Civil Action Number 3-84-0578-G, currently pending in the United States District Court for the Northern District of Texas;

2. I am Chairman of the Board and Chief Executive Officer for Hi-Plains Savings and Loan Association and have held that position for all times relevant to this Affidavit;

3. I have personal knowledge of the facts which are included in this Affidavit, and would state that since on or about August 5, 1983, I have had Michael F. Pezzulli as counsel of record involved in litigation between W. W. "Doc" Taylor, Southwest Mortgage Service Corporation, Hi-Plains Savings and Loan Association, and others;

4. Those suits first began in the District Court for Deaf Smith County, Texas, 222nd Judicial District, in Civil Action CI-83-E-059 and those civil actions were later removed to the United States District Court for the Northern District of Texas at Amarillo which litigation is now styled *Hi-Plains Savings and Loan Association vs. Southwest Mortgage Service Corporation and W. W. "Doc" Taylor,* Civil Action Number 2-83-181, and which civil action is currently pending;

5. I am also the same T. L. Welker who is a Defendant in the above captioned litigation which suit was filed on or about June 7, 1984;

6. On information and belief, I am the same T. L. Welker whom the Plaintiffs' allege, in the above captioned litigation, that alleged:

"46. . . . called Taylors' landlord and falsely told him that Taylor had listed the landlord's property as an asset on Taylors' financial statement.

7. That at no time have I ever contacted Mr. Gerald Harris Stool and falsely told him that W. W. Taylor had listed the landlord's property, designated as 3905 Turtle Creek Blvd., Dallas, Texas 75219, as an asset on W. W. Taylor's financial statement as is alleged in paragraph 46 of the Complaint;

8. That paragraph 46 of the Complaint is false;

9. That I have read the entire deposition of Gerald Harris Stool taken on June 29, 1984;

10. That I agree with Mr. Stool's deposition testimony that I do know him but that I never contacted him and falsely told him that Mr. Taylor had listed the landlord's property as an asset on Mr. Taylor's financial statement (Stool deposition, page 13, lines 22-25, and page 14, lines 1-7);

11. That I agree with Mr. Stool's deposition testimony that I never sent any written communication to Mr. Stool falsely listing the landlord's property as an asset on Taylor's financial statement (Stool deposition, page 14, lines 11-17);

12. That I agree with Mr. Stool that I never told Mr. Stool that Taylor had listed the landlord's property as an asset on Taylor's financial statement (Stool deposition, page 14, lines 20-25);

13. That I agree with Mr. Stool that no one from Hi-Plains Savings and Loan Association, Hereford, Texas, ever contacted Mr. Stool and told Mr. Stool that Mr. Taylor had listed the landlord's property, 3905 Turtle Creek Blvd., as an asset

on Taylor's financial statement (Stool deposition, page 15, lines 10-25, and page 16, lines 1-10);

14. That I know of no instance when attorney Michael F. Pezzulli, my lawyer, ever allegedly contacted Mr. Stool and falsely told Mr. Stool that Mr. Taylor had listed the landlord's property as an asset on Taylor's financial statement;

15. That upon information and belief, I am the same T. L. Welker who is alleged to have knowingly lodged a false complaint with the zoning authorities of the City of Dallas, Texas, causing said zoning authorities to make an investigation to harass Taylor and/or SMSC, however, the zoning authorities allegedly found no violation as is alleged in paragraph 47 of the Complaint;

16. That paragraph 47 of the Complaint is false;

17. That I have read the entire deposition of Stephen English Smith, that acting director of the Department of Housing and Neighborhood Services, City of Dallas, which deposition was taken on June 28, 1984:

18. That I was not the source of any "anonymous" call in computer complaint made about Taylor or SMSC as is recited by Mr. Smith in his deposition (Smith deposition, page 13, lines 8-20);

19. That I have no idea whether or not a neighbor of Taylors may have called in to complain, as recited by Mr. Smith in his "general assumption" that neighbors are the ones who do the complaining on an anonymous basis (Smith deposition, page 15, lines 1-4);

20. That I was not present when Taylor allegedly admitted to at least one (1) violation of the zoning ordinances concerning his advertsising in the Yellow Pages although operating a

business out of a residential premises (Smith deposition, page 15, lines 18-25, and page 16, lines 1-4);

21. That to the best of my knowledge, Attorney Michael F. Pezzulli was not the source of the "anonymous complaint" received on the computer of the planning and zoning offices run by Mr. Smith (Smith deposition, page 20, lines 10-14);

22. That I have no idea as to who the anonymous complainant may have been, but based upon the deposition of Mr. Smith, and solely upon that basis, it would appear that there was justification under the zoning laws for the complaint and that the statements by Mr. Taylor in paragraph 47 of the Complaint are false;

FURTHER, THIS AFFIANT SAYETH NOT.

/s/ T. L. WELKER

T. L. WELKER

SUBSCRIBED AND SWORN TO BEFORE ME, on this the 11th day of July, 1984.

/s/

Notary Public in and for
The State of Texas

My Commission Expires:

_____

Affidavit of Michael F. Pezzulli in Support of Motion for Partial Summary Judgment

The State of Texas }
County of Dallas }

Michael F. Pezzulli, first being duly sworn, deposes and says:

1. I am the same Michael F. Pezzulli who has been sued for approximately Fifty Million Dollars ($50,000,000.00) by W. W. Taylor and Southwest Mortgage Service Corporation in Civil Action Number 3-84-0578-G currently pending in the United States District Court for the Northern District of Texas;

2. I am also defense counsel for Hi-Plains Savings and Loan Association and T. L. Welker;

3. I have personal knowledge of the facts which are included in this Affidavit and state that since on or about August 5, 1983, I have been counsel of record involved in litigation between W. W. "Doc" Taylor, Southwest Mortgage Service Corporation, Hi-Plains Savings and Loan Association, and others.

4. Those suits began first in the District Court for Deaf Smith County, Texas, 222nd Judicial District in Civil Action CI-83-E-059, which civil action was later removed to the United States District Court for the Northern District of Texas, at Amarillo, which litigation is now styled *Hi-Plains Savings and Loan Association vs. Southwest Mortgage Service Corporation and W. W. "Doc" Taylor,* Civil Action Number 2-83-181 and which civil action is currently pending;

5. As noted above, I am also counsel of record for T. L. Welker and Hi-Plains in the above captioned litigation also

involving W. W. Taylor and Southwest Mortgage Service Corporation which suit was filed on or about June 7, 1984;

6. That I am the same attorney who questioned Mr. Taylor under oath in the Amarillo litigation on February 6, 1984 and asked him the questions to which he gave the responses which are contained in Exhibit "3," consisting of the cover page, page 2, page 3, and pages 64-74 which were excerpts of the deposition upon oral examination of W. S. Taylor and which Exhibit "3" is attached to the Request of Defendants T. L. Welker and Hi-Plains Saving and Loan Association to Admit — Set Number One, duly filed with this Court on June 26, 1984;

7. Upon information and belief, I am the same Michael F. Pezzulli whom the Plaintiffs allege, in the above styled captioned litigation who allegedly:

> "46. . . . called Taylors' landlord and falsely told him that Taylor had listed the landlords property as an asset on Taylors' financial statement."

8. I am also the same Michael F. Pezzulli who caused the issuance of the subpoena for Gerald Harris Stool, on June 29, 1984, the landlord of W. W. Taylor;

9. That at no time have I ever contacted Mr. Stool and falsely told him that W. W. Taylor had listed the landlord's property, designated as 3905 Turtle Creek Blvd., Dallas, Texas, as an asset on W. W. Taylor's financial statement as alleged in paragraph 46 of the Complaint;

10. That paragraph 46 of the Complaint is false;

11. That I agree with Mr. Stool, and his deposition testimony at page 13, that prior to the deposition of Mr. Stool on June 29, 1984, I had never met him before that day (Stool deposition, page 13, lines 9-11);

12. That I agree with Mr. Stool's deposition testimony that I had never spoken with him on the telephone (Stool deposition at page 13, lines 12-14;

13. That I agree with Mr. Stool that there is no truth to the allegation that I ever called Mr. Stool and falsely told him that Mr. Taylor had listed the landlord's property as an asset on Mr. Taylor's financial statement (Stool deposition, pages 13, lines 15-19), and I agree with Mr. Stool that we are both certain about that (Stool deposition, page 13, lines 20-21);

14. That I know of no instance when T.L.Welker, my client, ever allegedly called Mr. Stool and falsely told Mr. Stool that Mr. Taylor had listed the landlord's property as an asset on Taylor's financial statement (Stool deposition, page 13, lines 22-25, and page 13, lines 1-3);

15. That to the best of my knowledge, there is no truth to the claim by Mr. Taylor that Mr. Welker at any time called Mr. Stool and made the statement to Mr. Stool that Taylor had listed the landlord's property as an asset on Taylor's financial statement as is recited in paragraph 46 of the Complaint (Stool deposition, page 14, lines 4-7);

16. That at no time did I ever furnish any written communication from myself, or from T. L. Welker to Mr. Stool falsely informing Mr. Stool that Taylor had listed the landlord's property as an asset on Taylor's financial statement, and I agree with Mr. Stool's testimony in this regard (Stool Deposition, page 14, lines 11-17);

17. That I agree with Mr. Stool's statement that neither myself nor Mr. Welker ever told Mr. Stool that Mr. Taylor had listed the landlord's property on Taylor's financial statement, whether such statement was false or otherwise (Stool deposition, page 14, lines 20-25);

18. That upon information and belief, I am the same Michael F. Pezzulli who is alleged to have knowingly lodged a false complaint with the zoning authorities of the City of Dallas, Texas, causing said zoning authorities to make an investigation to harass Taylor and/or SMSC, however, the zoning authorities allegedly found no violation as is alleged in paragraph 47 of the Complaint.

19. That paragraph 47 of the Complaint is false;

20. That I am the same Michael F. Pezzulli who took the deposition of Steven English Smith on June 28, 1984;

21. That I was not the source of any "anonymous" call-in computer complaint made about Taylor or SMSC as recited by Mr. Smith in his deposition (Smith deposition, page 13, lines 8-20);

22. That I have no idea whether or not a neighbor of Taylors may have called in to complain as recited by Mr. Smith in his "general assumption" that neighbors are the ones who do the complaining on an anonymous basis (Smith deposition, page 15, lines 1-4);

23. That I was not present when Taylor allegedly admitted to one (1) violation of the zoning ordinances concerning his advertising in the Yellow Pages although operating a business out a residential premises (Smith deposition, page 15, lines 18-25, and page 16, lines 1-4):

24. That to the best of my knowledge, T. L. Welker was not the source of the "anonymous complaint" received on the computer of the planning and zoning offices run by Mr. Smith (Smith deposition, page 20, lines 10-14);

25. That I have no idea as to who the anonymous complainant may have been, but based upon the deposition of Mr. Smith, and solely upon that basis, it would appear that there

was justification under the zoning laws for the complaint and that the statements by Mr. Taylor in paragraph 47 of the Complaint are false:

FURTHER, THIS AFFIANT SAYETH NOT.

/s/ MICHAEL E. PEZZULLI
MICHAEL E. PEZZULLI

SUBSCRIBED AND SWORN TO BEFORE ME, on this the 31st day of July, 1984.

/s/
Notary Public in and for The State of Texas

My Commission Expires:

11-30-85

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF TEXAS
DALLAS DIVISION

W. W. TAYLOR AND SOUTHWEST MORTGAGE SERVICE CORP.,

vs.

FEDERAL HOME LOAN BANK BOARD, ET AL

Civil Case Number 3-81-0578-G

MEMORANDUM IN SUPPORT OF MOTION FOR PARTIAL SUMMARY JUDGMENT

The three Defendants, T. L. Welker, Hi-Plains Savings and Loan Association and Michael F. Pezzulli, by counsel, respectfully have moved the Court for Partial Summary Judgment specifically with respect to Paragraphs 46 and 47 of the Complaint filed by W. W. "Doc" Taylor and Southwest Mortgage Service Corporation. These defendants contend there is no genuine issue of fact, and as a matter of law, they are entitled to judgment because the allegations contained in those Paragraphs, 46 and 47 are categorically false.

FACTS RE: PARAGRAPH 46 OF THE COMPLAINT

Paragraph 46 of the Complaint, W. W. Taylor (Taylor) and Southwest Mortgage Service Corporation (SMSC) complain that as a part of some conspiracy, attorney Pezzulli and his client, T. L. Welker, Chairman of the Board and Chief Executive Officer of Hi-Plains Savings and Loan contacted Mr. Taylor's landlord. The deposition of Mr. Gerald Harris Stool

taken on June 29, 1984, which has been filed in this case, reflects that Mr. Stool is Mr. Taylor's landlord.

Paragraph 46 of the Complaint continues and allegedly, Pezzulli and Welker called Taylor's landlord, Mr. Stool and falsely told him that Taylor had listed the landlord's property as an asset on Taylor's financial statement.

When the alleged remarks occurred, where they occurred, or who was present when they occurred, other than Pezzulli, Welker and Taylor is not specified in the bare-bones pleading contained in Paragraph 46.

Mr. Stool has testified in his deposition that no such conversation ever occurred at any time. See for example Stool deposition, Pages 13-14.

Also attached to the Motion for Summary Judgment is MPSJ Exhibit No. 2, an affidavit of T. L. Welker wherein, after preliminaries, Mr. Welker recites that he never contacted Mr. Stool and falsely told him that W. W. Taylor had listed the landlord's property as an asset on Taylor's financial statement. See MPSJ Exhibit No. 2, Paragraph 6-14.

Mr. Pezzulli also filed an affidavit, MPSJ Exhibit No. 3, in which, after preliminaries, Mr. Pezzulli recites that he likewise never called Taylor's landlord and falsely told him that Taylor had listed the landlord's property as an asset on Taylor's financial statement. Pezzulli affidavit, Paragraph 7-17.

Based upon the foregoing, it is an undisputed fact that Pezzulli and Welker never called Taylor's landlord and falsely told him that Taylor had listed the landlord's property as an asset on Taylor's financial statement. All parties to this conversation deny that it ever occurred and Summary Judgment is appropriate.

FACTS
RE: PARAGRAPH 47 OF THE COMPLAINT

Taylor and SMSC complain in Paragraph 47 of the Complaint that Pezzulli and Welker knowingly lodged a false complaint with the zoning authorities of the City of Dallas, Texas. This Complaint caused the zoning authorities to make an investigation of Mr. Taylor and to harass Mr. Taylor. Reportedly, the zoning authorities found no violations of the zoning ordinances resulting in Mr. Taylor being "put upon" or "harassed" as he says. See Paragraph 47 of the Complaint.

On June 28, 1984 the oral deposition of Stephen English Smith was taken. That deposition has been filed in this case. Mr. Smith is the acting Director of the Department of Housing and Neighborhood Services for the City of Dallas, Smith deposition Page 5, Line 18-19, and the scope of his responsibilities includes responding to complaints with respect to zoning or housing violations. Smith deposition Page 6, at Line 3-5.

Pursuant to subpoena, Mr. Smith produced the files regarding the residence located at 3905 Turtle Creek, Dallas, Texas. This is the listed residence of Southwest Mortgage Service Corporation. See the companion deposition of Gerald Stool, and the lease attached to Mr. Stool's deposition for the residence at 3905 Turtle Creek, Dallas, Texas. See also Smith deposition Page 10.

According to Mr. Smith, and the records which are attached to his deposition, being Exhibits 1 through 4 and Exhibits 6 and 7, it would appear that there was an anomymous complaint made to the zoning authorites over their computer system. Smith deposition Page 13, Lines 6-20. According to Mr. Smith, there were some 35,000 calls which were received concerning zoning complaints, and some 40 to 50 percent of those complaints are anomymous. Smith deposition Page 14, Lines 4-14.

The Department of Zoning has absolutely no idea as to who allegedly made this "anomymous call." Smith deposition at Page 15.

Mr. Smith then clearly states that the complaint which was received concerning 3905 Turtle Creek was not a "false complaint," and he has absolutely no idea who made that complaint or the source of it. Smith deposition at Page 20. No investigation was made to "harass Plaintiffs," nor was there any harassment of Mr. Taylor by the investigator. The Zoning Department is directly under Mr. Smith's control. Smith deposition at Page 20, Lines 1-23.

To also negate the spurious claim filed by Taylor and SMSC, T. L. Welker executed an affidavit, MPSJ Exhibit No. 2, which, after preliminaries, recites at Paragraphs 15-22 that neither Mr. Welker, nor anyone he is associated with was the source of any alleged complaint to the planning and zoning people as alleged in Paragrah 47 of the Complaint by Taylor and SMSC. Attorney Pezzulli has filed an affidavit, MPSJ Exhibit No. 3, which, after preliminaries, recites in Paragraphs 18-25 that Mr. Pezzulli, nor anyone he knows, was the source of the alleged complaint with the zoning authorities.

Unfortunately for Mr. Taylor and SMSC, the issue does not stop there. Mr. Smith has testified that indeed there *was* a zoning violation and Mr. Taylor's claims that there were no zoning violations is "false". Smith deposition Page 20, Lines 20-24.

What the investigation of Mr. Taylor and his crowd showed was that Mr. Taylor admitted that he had an ad in the telephone directory which was advertising residential real estate as a business in direct violation of Zoning Ordinance 7.5. See Smith deposition Page 21, Lines 1-7 and Exhibit 1, 2 and 3 attached to the Smith deposition and MPSJ Exhibit 1, the zoning ordinance.

Exhibit 1 to the Smith deposition is from Mr. Taylor, signed by Mr. Brown, one of his employees, to the City of Dallas canceling their listing in the yellow pages as operating a business out of 3905 Turtle Creek Blvd. Exhibit No. 2 is a letter to Southwestern Bell, Yellow Pages, canceling the same ad. Exhibit No. 3 is the actual listing of the Yellow Pages from 1983 for Greater Dallas showing that Southwest Mortgage Service Copporation showed a "home office" at 3905 Turtle Creek Blvd. at their present telephone number 522-7060.

What is even more outrageous is that the current Greater Dallas Yellow Pages, April 1984-1985 still shows Southwest Mortgage Service Corporation at 3905 Turtle Creek Blvd. with the telephone number of 522-7060.

We will not editorialize further with respect to this zoning violation, but not only does it appear that the zoning violation complaint as alleged by Mr. Taylor in Paragraph 47 of the Complaint is false, but it appears that the existence of the zoning violation was completely true, and it appears that it continues to the present day. Mr. Taylor has boldly admitted that he has a number of employees working at his Turtle Creek residence, see Exhibit No. 5 of the deposition of Stephen Smith, Volume 1 of 3 Volumes involving the oral deposition of W. W. Taylor taken in the Amarillo litigation on October 21, 1983.

Because it appears that the allegations in Paragraph 47 of the Complaint are categorically false, summary judgment should be granted.

THE LAW

Under Rule 56 of the Federal Rules of Civil Procedure, one need only show that there are no genuine issues of material fact that the moving parties are entitled judgment as a matter

of law in order to secure summary judgment. F.R.C.P. 56(b). There is no countervailing evidence before the Court at this time nor, do we believe, there could be competent evidence before the Court to controvert the false allegations contained in Paragraphs 46 amd 47 of this Complaint. Accordingly, Partial Summary Judgment should be granted forthwith concerning Paragraphs 46 and 47 of the Complaint.

Respectfully submitted,

MICHAEL F. PEZZULLI, P.C.

/s/ MICHAEL F. PEZZULLI
MICHAEL F. PEZZULLI

/s/ DAVID C. McCUE
DAVID C. McCUE
701 Commerce, Suite 200
Dallas, Texas 75202
(214) 742-4345

CARRINGTON, COLEMAN, SLOMAN
& BLUMENTHAL

/s/ CORBET F. BRYANT, JR.
CORBET F. BRYANT, JR.
Plaza of the Americas
2500 South Tower
Dallas, Texas 75201

CERTIFICATE OF SERVICE

This is to certify that a true and correct copy of the foregoing has this day been mailed by First Class mail to the following:

Ms. Dorothy G. Palumbo
Attorney for Plaintiffs
3905 Turtle Creek Blvd.
Dallas, Texas 75219

Mr. Richard Shore
Attorney for Defendants Fred Smith, John McKenzie, Paul Bardacke, and David W. Bonem

Stradley, Schmidt, Stephens & Wallace
One Campbell Centre
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Stafford Hutchison, AUSA
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Country Savings and Ray
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P.O. Box 1487
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CORBET F. BRYANT, JR.
Attorney for Defendant Pezzulli

CARRINGTON, COLEMAN, SLOMAN
& BLUMENTHAL
2500 South Tower
Plaza of the Americas
Dallas, Texas 75201

all this 16th day of August, 1984.

/s/ DAVID C. McCUE
DAVID C. McCUE

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF TEXAS
DALLAS DIVISION

W. W. TAYLOR AND SOUTHWEST MORTGAGE SERVICE CORP.,

vs.

FEDERAL HOME LOAN BANK BOARD, ET AL

Civil Action Number
CA3-84-0578-G

MOTION AND MEMORANDUM BY HI-PLAINS, WELKER, AND PEZZULLI TO DISMISS PARAGRAPHS 38, 40, 42, 43, 44, 45, 46, 47, 50, 51 AND 52 FOR LACK OF SUBJECT MATTER JURISDICTION AND AS IMPORTANT PENDENT CLAIMS

Hi-Plains Savings and Loan Association ("Hi-Plains"), T. L. Welker ("Welker"), and Michael F. Pezzulli ("Pezzulli"), move to dismiss Paragraphs 38, 40, 42, 43, 44, 45, 46, 47, 50, 51, and 52 of the civil rights Complaint because of a lack of subject matter jurisdiction and because the claims are not properly pendent claims for consideration in this Court for the following reasons:

1. As more fully appears from the Taylor/SMSC Answers to Interrogatories — Set Number One filed June 26, 1984 before the Sanctions hearing before Magistrate Sanderson, no state action has been plead with respect to the Paragraphs numbered above in the Complaint which purports to seek civil rights relief under 42 U.S.C. Section 1983, *inter alia,* and which purports to base jurisdiction under 28 U.S.C. Section 1343. There are no federal rights implicated;

2. Southwest Mortgage Service Corporation ("SMSC") and W. W. Taylor ("Taylor") have failed, despite two (2) efforts, to answer interrogatories properly addressed to the issues of state action with respect to all aspects of the Complaint. See for example Answers to Interrogatory Numbers 21 and 22 filed July 2, 1984 where they only refer one back to the Complaint;

3. The paragraphs specified above are therefore nothing more or less than pendent state law claims mostly in libel, slander or some other defamatory tort over which this Court is not required to exercise jurisdiction. They do not arise, as more fully appears from the Complaint itself and the Affidavit of Michael F. Pezzulli attached to the Motion for Reconsideration Re: Disqualification, out of a common nucleus of operative facts and accordingly, the same should be stricken because of a lack of state action and subject matter jurisdiction under the civil rights statutes and because of a lack of any other bases upon which to predicate jurisdiction in Federal Courts as more fully appears from the face of numbered paragraphs of the Complaint itself;

4. Said dismissal, if granted, will moot the requested disqualification of Michael F. Pezzulli, and the law firm of Michael F. Pezzulli, P.C. and the Motion to Reconsider.

WHEREFORE, Hi-Plains, Welker and Pezzulli pray that Paragraphs 38, 40, 42, 43, 44, 45, 46, 47, 50, 51 and 52 be dismissed for lack of subject matter jurisdiction and under this Court's discretionary power to not entertain pendent state/law claims.

Respectively submitted,
MICHAEL F. PEZZULLI, P.C.

/s/
MICHAEL F. PEZZULLI

/s/
DAVID C. MCCUE
701 Commerce, Suite 200
Dallas, Texas 75202
(214) 742-4345

Attorney for Defendants Hi-Plains and Welker

CARRINGTON, COLEMAN, SLOMAN, & BLUMENTHAL

/s/ CORBET F. BRYANT, JR.
CORBET F. BRYANT, JR.
2500 South Tower
Plaza of the Americas
Dallas, Texas 75201

Attorney for Defendant
Michael F. Pezzulli

CERTIFICATE OF CONFERENCE

I have spoken with counsel for Taylor and SMSC and they will not agree to this Motion.

/s/ DAVID C. McCUE
DAVID C. MCCUE

CERTIFICATE OF SERVICE

This is to certify that a true and correct copy of the foregoing has this day been mailed by first mail, to the following individuals:

MS. DOROTHY PALUMBO
3905 Turtle Creek Blvd.
Dallas, Texas 75219

MR. RICHARD SHORE
One Campbell Centre
Dallas, Texas 75206

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Dallas, Texas 75242

MR. JAMES C. TODD,
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P.O. Box 12548
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MR. SCOTT OLIVER,
KENNETH WAGNER, AND
RICARDO ORTEGA
P.O. BOX 1487
ALBUQUERQUE, N.M. 87102

MR. CORBET F. BRYANT, JR.
2500 South Tower
Plaza of the Americas
Dallas, Texas 75201

all this 16th day of August, 1984.

/s/
DAVID C. MCCUE

MEMORANDUM IN SUPPORT OF MOTION TO DISMISS FOR LACK OF SUBJECT MATTER AND PENDENT JURISDICTION

Paragraphs 38, 40, 42, 43, 44, 45, 46, 47, 50, 51 and 52 of the omplaint do not relate in any way to claims involving "state ction." Interrogatories 21 and 22 filed June 26, 1984, and vasively answered by Taylor and SMSC on July 2, 1984 just rior to the sanctions hearing before Magistrate Sanderson, equested all evidence of "state action" which Taylor and SMSC had as a jurisdictional prerequisite for stating a cause f action under 42 U.S.C. Section 1983. As more fully appears rom Exhibits A and B, attached, the first *pro se* responses to nterrogatory answers, and then the responses of attorney Dorothy Palumbo on behalf of Taylor and SMSC, respectively, no "state action" allegations have been brought forward to ustify continuing jurisdiction of this Court under 28 U.S.C. Section 1343.

The Complaint itself, and Taylor's admissions in Paragraphs 42 and 53 of the Complaint seek to state claims against Hi-Plains, Welker and Pezzulli in the nature of common law claims for libel, slander or defamation and do not relate in any way to any federally protected right. For example, as more fully appears in Paragraphs 46 and 47 of the Complaint (the landlord and zoning claims) which are the subject of a separate Motion for Partial Summary Judgment, the claims do not arise out of any common nucleus of operative fact at all related to or connected with any federally protected right. Accordingly, pendent jurisdiction is improper.

These defenses of lack of subject matter jurisdiction and pendent claims were raised by Hi-Plains, Welker and Pezzulli as affirmative defenses in the Answer of Hi-Plains and T. L. Welker to the Complaint, (see the Answer filed May 17, 1984

by Hi-Plains and T. L. Welker, "Second Defense, Tenth Defense, and Twelfth Defense") and in the Defendant [Pezzulli's] Original Answer (filed on or about June 8, 1984, 'Sixth Defense, Tenth Defense, and Twelfth Defense"). They are now brought on for disposition per this motion.

The undersigned respectfully suggest that the Court lacks subject matter jurisdiction directly under 28 U.S.C. Section 1343, for any cause of action under 42 U.S.C. Section 1983 or Section 1985 as pleaded in Paragraphs 38, 40, 42, 43, 44, 45, 46, 47, 50, 51 and 52 of the Complaint and further suggest that such claims do not arise out of a common nucleus of operative fact. They accordingly are improper pendent claims for submission to this Court at this time, and the same should be dismissed forthwith.

Said dismissal, if granted, will moot the Motion to Disqualify Michael F. Pezzulli and his law firm which is pending before this Court on Motion to Reconsider.

The Supreme Court of the United States has held in *Paul v. Davis,* 424 U.S. 693 (1976) that generally, defamation does not constitute a federally recognized cause of action under either 42 U.S.C. Section 1983 or 42 U.S.C. Section 1985. These are the precise bases (along with 42 U.S.C. Section 1981) upon which Taylor attempts to predicate a cause of action under 28 U.S.C. Section 1343. *See,* the Complaint, Paragraph 27 "Jurisdiction." A long line of cases interpreting *Paul* have clearly reaffirmed dismissal of such causes in the civil rights context. It applies squarely in the Fifth Circuit.

In *Cole v. Gray,* 638 F.2d 804 (5th Cir. 1981), a colonel in the Alabama National Guard filed suit under 42 U.S.C. Section 1983 and 1985 against numerous defendants alleging a campaign of "harrasment and revenge," and basically, claimed that by certain comments, various legislators and administrative personnel had defamed Mr. Cole, deprived him

of his good name, and in conspiracy with others, had sought to deprive him of his position in the Alabama National Guard without due process.

The Fifth Circuit held that the district court was correct in finding no cause of action under the civil rights act and that the loss of a good name, or defamation, was not a liberty or property interest which were protected by 42 U.S.C. Section 1983 or Section 1985. The dismissal was upheld. Interestingly, the Court also dismissed the conspiracy claims because of the lack of any proof of the conspiracy. Mr. Taylor may be left with a state law claim, but he certainly has no federally recognized cause of action for the allegations in his Complaint. *Clark v. Solemn*, 628 F.2d 1120 (8th Cir. 1980).

There are no allegations of "state action." Nowhere in Paragraphs 38, 40, 42, 43, 44, 45, 46, 47, 50, 51 and 52 are there any specific allegations involving conduct pursuant to state action. Instead in Paragraph 40, the claim is "harassment" with respect to Mr. Taylor, SMSC, and his contracts. In Paragraphs 42-47, Taylor clearly alleges state common law tort claims (and he *admits* as much in paragraph 42 thereof) for embezzlement or conversion of funds (Paragraph 43); "harassing" telephone calls and defamation (Paragraph 44); "harassment by taking depositions (presumably some abuse of process — Paragraph 45); libel or slander, or both inartfully pleaded (Paragraph 46 concerning the landlord); some libel, slander or false light claim concerning the zoning authorities (Paragraph 47).

The litany continues with business libel or slander concerning the financial position of Taylor under New Mexico law (why this Court should entertain a New Mexico cause of action is nowhere justified by Taylor or SMSC under conflicts of law principles); abuse of process in some manner involving developers in filing suit against SMSC and Taylor (Paragraph

50); abuse of process for filing the RICO claims in Judge Robinson's Court all of which claims remain unresolved at the present time (Paragraph 51); and finally, libel or slander, or both, involving the four (4) part television program which purportedly ruined the reputation of a previously convicted felon (Paragraph 52). In Paragraph 53 of the Complaint, Taylor again candidly *admits* he is seeking claims in the nature of "slander."

For all these reasons, it is crystal clear that Taylor only seeks recovery from Pezzulli for pendent state law claims upon which there is no independent federal connection and under *Paul v. Davis, supra,* this Court must dismiss this action. There simply is no state action implicated nor any federal right involved to be vindicated.

While it is indeed true that under settled federal law, this Court retains discretion with respect to pendent claims, the district courts have not hesitated to rule that pendent jurisdiction over state law claims will *not* be exercised in the absence of any federal claim serving as a jurisdictional predicate. *See, United Mine Workers v. Gibbs,* 383 U.S. 715 (1966); *accord: Stern v. New Haven Community Schools,* 529 F. Supp. 29; 529 F. Supp. 31 (E.D. Mich. 1981) (marijuana in a school arrest in 1983, pendent claims dismissed); *Atkinson v. City of Fort Collins,* 583 F. Supp. 1046 (D. Colo. 1984) (constitutional claim to light, air, view, privacy and protection, pendant claims dismissed).

Because there is no federally implicated right in this case; no allegations of state action; and no necessity for this Court to retain jurisdiction over the pendent state law claims of Taylor, and because he has an adequate remedy within the state court

system, Paragraphs 38, 40, 42, 43, 44, 45, 46, 47, 50, 51 and 52 of the Complaint should be dismissed forthwith.

Respectfully submitted,
MICHAEL F. PEZZULLI, P.C.

/s/
MICHAEL F. PEZZULLI

/s/
DAVID C. MCCUE
701 Commerce, Suite 200
Dallas, Texas 75202
(214) 742-4345

CARRINGTON, COLEMAN, SLOMAN,
& BLUMENTHAL

/s/
CORBET P. BRYANT, JR.
2500 South Tower
Plaza of the Americas
Dallas, Texas 75201

Attorney for Defendant
Michael F. Pezzulli

CERTIFICATE OF SERVICE

This is to certify that a true and correct copy of the foregoing has this day been mailed by first class mail, to the following individuals:

Ms. Dorothy Palumbo
3905 Turtle Creek Blvd.
Dallas, Texas 75219

Mr. Richard Shore
One Campbell Centre
Dallas, Texas 75206

Mr. Stafford Hutchinson, AUSA
1100 Commerce, Room 16G28
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Mr. James C. Todd,
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P.O. Box 12548
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Mr. Scott Oliver,
Kenneth Wagner,
and Ricardo Ortega
P.O. Box 1487
Albuquerque, N.M. 87102

MR. CORBET F. BRYANT, JR.
2500 South Tower
Plaza of the Americas
Dallas, Texas 75201

all this 16th day, of August, 1984.

/s/
DAVID C. MCCUE

APPENDIX V

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF TEXAS
DALLAS DIVISION

W. W. TAYLOR AND SOUTHWEST MORTGAGE SERVICE CORPORATION

vs.

FEDERAL HOME LOAN BANK BOARD, ET. AL.

Civil Action Number
CA 3-84-0578-G

MOTION AND MEMORANDUM BY MICHAEL F. PEZZULLI FOR SUMMARY JUDGMENT AS TO ENTIRE CASE EXCEPT FOR PARAGRAPHS 46 AND 47 OF THE COMPLAINT

Attorney, Michael F. Pezzulli ("Pezzulli") respectfully moves the Court for summary judgment as to all claims in the Complaint except for Paragraphs 46 and 47 of the Complaint which are the subject of a separate Motion for Partial Summary Judgment filed simultaneously herewith for the following reasons:

1. This Motion is based upon:

(a) the Affidavit of Michael F. Pezzulli attached to the Motion Re: Reconsideration on Disqualification of Michael F. Pezzulli and his law firm;

(b) upon all the discovery filed on the 26th day of June, 1984, by Welker and Hi-Plains directed to Taylor and SMSC, involving the Plaintiffs, W. W. Taylor ("Taylor") and Southwest Mortgage Service Corporation ("SMSC") and their responses (excerpts of which are attached hereto and marked as Exhibits 1 and 2), being the preliminary and then the final answers and responses to discovery made by Taylor and SMSC made after a Motion for Sanctions was

filed by Hi-Plains and Welker against Taylor and SMSC; and

(c) finally, upon the Order entered by Magistrate Sanderson on August 1, 1984 reflecting his discovery rulings made at the hearing held on July 3, 1984.

2. At the hearing held before Magistrate Sanderson on July 3, 1984, Exhibit 2 (the Taylor/SMSC Answers which were filed on July 2, 1984) was proferred to the Court as the completed answers and responses to the discovery filed June 26, 1984, by Hi-Plains and Welker. Magistrate Sanderson indicated at that time that the responses filed on July 2, 1984 were still insufficient and that proper and full responses should be made by July 30, 1984. Thus Taylor and SMSC had twenty-seven (27) additional days to file proper and sufficient responses. It is undisputed that no such responses have ever been served nor filed and that Taylor and SMSC are coldly standing on their responses filed on July 2, 1984.

3. It is further undisputed that in response to Interrogatories 8 through 24 filed June 26, 1984 with this Court Taylor and SMSC in their July 2, 1984 responses have set forth *no facts* recited other than contained in the Complaint; no witnesses were identified other than as were mentioned in the Complaint if any; no documents were identified other than identified in the Complaint; no experts were identified at all, and Taylor and SMSC were content to rely solely upon the unverified allegations in the *pro se* Complaint filed by Mr. Taylor to support their discovery as justification for their filing of this lawsuit and naming, among others, Attorney Pezzulli as a Defendant. Nothing at all was proferred to support the absurd claims of damages claimed by Taylor in the millions and millions of dollars.

4. It is likewise undisputed that at the present time, there is not one fact filed under oath before the Court which constitutes corroboration or verification of any claim made by Taylor or SMSC against Attorney Pezzulli.

5. It is undisputed that Pezzulli's name is mentioned in terms of a substantive claim only in Paragraphs 38, 40, 42, 43, 44, 45, 46, 47, 50, 51 and 52 of the Complaint.

6. Because there is no genuine issue of material fact in this case; because the Plaintiffs have been given two (2) full opportunities to respond to the discovery, first in the role of Taylor as a *pro se* litigant, any then by counsel, Ms. Dorothy Palumbo (see Exhibits 1 and 2); and because Taylor and SMSC chose to rest on the unverified allegations contained in their Complaint despite Magistrate Sanderson's admonition under Rule 56(e), there is no genuine issue of material fact and as a matter of law, Pezzulli is entitled to summary judgment forthwith;

WHEREFORE, Attorney Michael F. Pezzulli demands summary judgment, costs and attorney's fees as to all claims made against him in the Complaint.

Respectfully submitted,

CARRINGTON, COLEMAN, SLOMAN,
& BLUMENTHAL

/s/ CORBET F. BRYANT, JR.

CORBET F. BRYANT, JR.
2500 South Tower
Plaza of the Americas
Dallas, Texas 75201.

CERTIFICATE OF SERVICE

This is to certify that a true and correct copy of the foregoing has this day been mailed by first class mail, to the following individuals:

Ms. Dorothy Palumbo
3905 Turtle Creek Blvd.
Dallas, Texas 75219

Mr. Richard Shore
Stradley, Schmidt, Stephens
& Wallace
One Campbell Centre
Dallas, Texas 75206

Mr. Stafford Hutchinson, AUSA
1100 Commerce, Room 16G28
Dallas, Texas 75242

Mr. James C. Todd,
Asst. Atty. General
P.O. Box 12548
Capitol Station
Austin, Texas 78711

Mr. Scott Oliver,
Kenneth Wagner
and Ricardo Ortega
P.O. Box 1487
Albuquerque, New Mexico 87102

Mr. Michael F. Pezzulli
701 Commerce, Suite 200
Dallas, Texas 75202

all this 16th day August, 1984.

/s/ CORBET F. BRYANT, JR.
Corbet F. Bryant, Jr.

MEMORANDUM IN SUPPORT OF MOTION FOR SUMMARY JUDGMENT

On June 26, 1984, Hi-Plains and Welker filed with the Court comprehensive discovery as permitted by the Local Rules for this District. This discovery laid the factual predicate for a Motion to Compel and to Foreshorten Time filed by T. L. Welker and Hi-Plains Savings and Loan Association, also filed on June 26, 1984.

The discovery documents filed on June 26, 1984 were comprised of the following:

1. Defendents T. L. Welker and Hi-Plains Savings and Loan First Set of Written Interrogatories;

2. Request for Production of Documents by T. L. Welker and Hi-Plains Saving and Loan — Set No. 1;

3. Request of T. L. Welker and Hi-Plains Savings and Loan Association to Admit — Set No. 1;

4. Supplemental Request to Defendants T. L. Welker and Hi-Plains Savings and Loan to Admit — Set No. 1; and

5. Request for Production of Documents by T. L. Welker and Hi-Plains Savings and Loan — Set No. 1.

All of this discovery was carefully tailored to satisfy the Local Rules and basically to accomplish the following strategic format:

A. The Request to Admit and the Supplemental Request to Admit were served, and if any of the Requests to Admit were denied, then Interrogatory Number One sought the basis for such denial(s);

B. Interrogatory Number Two, in full compliance with the Federal Rules of Evidence sought the information from Mr. Taylor concerning his prior federal criminal conviction;

C. Interrogatories Number Three through Six sought information concerning damages and income tax information and any prior suits of Taylor and SMSC.

D. Interrogatory Number Seven and Eight sought information basically concerning experts and any general witnesses who may have knowledge about the Complaint;

E. Interrogatories Number Nine through Twenty-One specifically sought all facts that supported the particular numbered allegations in the Complaint (for example, all facts relative to Paragraph 52 of the Complaint); the identity of all persons having knowledge of such facts (again re: Paragraph 52 of the Complaint); and finally, all documents or evidence that related to such facts (again re: Paragraph 52 of the Complaint).

F. Interrogatories Number Nine through Twenty specifically sought this same information for each operative paragraph in the Complaint which dealt with Hi-Plains or T. L. Welker, and also which tangentially dealt with Attorney Michael F. Pezzulli. This included paragraphs 38, 40, 42, 43, 44, 45, 46, 47, 50, 51 and 52 of the Complaint;

G. A Request to Produce all identifiable documents was also made to secure all documents relating to any answered interrogatory.

On July 2, 1984, one (1) day before the hearing in front of Magistrate Sanderson on the aforesaid Motion for Sanctions by T. L. Welker and Hi-Plains Savings and Loan Association against W. W. Taylor and SMSC, the Plaintiffs filed their response to the Consolidated Motion to Compel Discovery and to Foreshorten Time with their Responses, such as they were, to all the discovery outlined above

Taylor refused to admit that he had previously been convicted of a federal crime and served time in the penitentiary within the time frame permitted for inquiry by the Federal Rules of Evidence (Interrogatory 2).

He refused to answer any information concerning income taxes alleging that his CPA stole his books for the last five (5) years. He refused to specify his alleged sources of income despite his claim for in excess of One Billion Dollars ($1,000,000,000.00) in damages (answers to Interrogatory Number Three and Four). He ignored Interrogatory Number Five and Six with respect to other prior suits, and promises at some future time to supply the names of experts in accordance with Interrogatory Number Seven.

From Interrogatory Number Eight through Interrogatory Number Twenty-Four, Mr. Taylor refuses to answer *any* Interrogatory and simply *refers the reader back to the Complaint* with some promise that at some in the future, some supplements to the Interrogatories will be forthcoming.

In the Request for Production of Documents, there is no Response whatsoever made other than at Paragraph 4 of the Response itself filed on July 2, 1984 apparently seeking protection from discovery abuse.

Close reference to the Request for Production of Documents will indicate that it was tied directly to the Interrogatories. For example, if there were any documents identified in Interrogatory Number Fifteen, and in particular part Fifteen (c) thereof, which related to Paragraph 46 of the Complaint, (the landlord claim), they were requested to be produced. That same format was followed throughout the Request for Production of Documents, and to date, not one document has been produced by Taylor and SMSC in support of their position those attached to the Complaint.

Likewise, the Responses to the Request to Admit are likewise full of evasive objections and half answers with limited exceptions, no answer made was responsive to the request. What is instructive to note in support of the Motion for Summary Judgment is Request to Admit Number Thirteen which refers to Exhibit 3 of the Request of Defendants T. L. Welker and Hi-Plains Savings and Loan Association to Admit — Set No. 1 filed June 26, 1984. Taylor and SMSC do admit the authenticity of Exhibit 3. This Exhibit consists of excerpts of a deposition of Mr. Taylor taken on February 6, 1984 in the Amarillo federal litigation currently pending before Judge Robinson.

Specifically, in Paragraph 46 of the Complaint, Taylor alleges that Pezzulli and Welker called Taylor's landlord and falsely told him that Taylor had listed the landlord's property as an asset on Taylor's financial statement. In Exhibit 3 attached to the Request to Admit, Taylor one month earlier testified about this landlord matter but stated at page 66 of Exhibit 3 that: "as far as I'm concerned, *you are your client.* I never get to see your client." He then translated that into the claim involving the landlord at page 68 of that deposition but Pezzulli, at lines 11 and 12 on page 68, expressly denied that he had ever talked to Gerald Stool, Taylor's landlord. (Note that Mr. Stool issue in Paragraph 46 of the Dallas case is the subject of a separate Motion for Summary Judgment).

Nevertheless, Taylor concedes that he blames Pezzulli for everything that Welker allegedly did, yet Welker, Pezzulli and Stool *all* deny that any such telephone conversation ever occurred between Pezzulli and/or Welker and Gerald Stool. See the Stool deposition which was taken on February 6, 1984, and the Affidavits filed in support of the Motion for Partial Summary Judgment.

This Dallas civil rights Complaint *with* the specificity set forth in Paragraph 46 of the Complaint was filed in the Complaint on or about April 16, 1984. In that Complaint, Taylor without equivocation claims that Pezzulli and Walker *did in fact* call Taylor's landlord and falsely tell him that Taylor had listed the landlord's property as an asset on Taylor's financial statements. As the Motion for Partial Summary Judgment which is filed herewith illustrates, that claim by Taylor had to be false when he filed it since he testified under oath approximately two (2) months previously that he had no knowledge that Pezzulli had done anything directly in the landlord case, but *blamed* it on Pezzulli because he was Welker's lawyer.

Respectfully, this rises to the level of a Rule 11 violation since Taylor obviously did not have good faith belief in the nature of this suit as the time he filed it. He could have sued Welker, deposed Welker, and then concluded that it was necessary to add Pezzulli as a party Defendant under the liberal rules of the Federal Rules of Civil Procedure if there was a factual basis for it, but did not do so. Instead, sued Pezzulli directly simply to harass Pezzulli, knock him out of the defense of the civil rights claim here in Dallas, and to cost him the expenses of a defense. Recall Taylor's testimony two (2) months prior to the suit "as far as I'm concerned, you are your client . . . ." *Id.*

This problem with Taylor testifying one way on February 6, 1984 and then filing a false Complaint in federal court does not stop there however. As more fully appears from Paragraph 47 of the Complaint (again the subject of a separate Motion for Partial Summary Judgment) Taylor was in fact truly responsible for a zoning violation in the City of Dallas committed by him yet filed his Complaint alleging that *Pezzulli and Welker* lodged a *false* complaint with the zoning authorities. The zoning complaint was not false; and moreover Pezzulli and

Welker never called Mr. Smith or anyone at zoning; and that is uncontroverted in Mr. Smith's deposition, in Pezzulli's Affidavit, and in Welker's Affidavit all filed again in support of the Motion for Partial Summary Judgment. Yet, Taylor has filed the false claims contained in Paragraph 47 of the Complaint which certainly rised to the level requiring Rule 11 sanctions.

The lies do not stop with just Paragraphs 46 and 47 however. Consider Paragraph 44 of the Complaint, where for example, Taylor charges that Pezzulli and Welker called SMSC's bonding agent and knew if they had bonded a criminal with the intention of causing the cancellation of the SMSC bond. Supposedly, Pezzulli and Welker later called back and falsely stated that they were standing along side an F.B.I. agent who had a warrant for Taylor's arrest and they thought the insurance company should know about it. (Paragraph 44, Complaint).

Those *very issues* were also covered in the February 6, 1984 deposition, Exhibit 3 attached to the Request to Admit — Set No. 1, commencing at page 67 in the Amarillo suit pending before Judge Robinson. Taylor testified as follows:

> A. When you call an insurance company or *someone at your instruction* calls an insurance company and asks them if they know they are doing business with a criminal or alternatively that you are standing with an F.B.I. agent that has a warrant for my arrest [Doc Taylor's] and you thought maybe they ought to just know about it. . . . I can go on and on.

Emphasis added.

Attorney Pezzulli then asked that Mr. Taylor go through each one of these alleged allegations (there were more than just the F.B.I. claim), and Taylor responded at pages 67 and 68 as follows:

A. *Either you or your client,* at your instruction or you at his instruction, one of the two.

Emphasis added.

The Affidavit of Pezzulli filed in support of the Motion for Summary Judgment indicates that no such discussion ever occurred by Attorney Pezzulli and the claim is false.

Nevertheless, Taylor specifically pleads in Paragraph 44 of the Complaint, some two (2) months later, that Pezzulli allegedly did exactly the same thing regarding the F.B.I. agent incident as Taylor had complained of on February 6, 1984; yet which incident he could only abstractly blame Pezzulli *or* Welker, but blame Pezzulli *only* as Welker's lawyer, *not* because he had a factual basis to charge Pezzulli with wrongdoing.

This Court should must stop at this point and ask: What had changed? What additional information did Taylor have to satisfy the Rule 11 good faith belief that Attorney Pezzulli had made those calls? The answer is no such information exists or existed.

In each of the instances set forth above, in each instance involving each allegation against Pezzulli in the Complaint, and in the Responses to Discovery by Taylor and SMSC, it is crystal clear that this Court is flippantly referred back to the Complaint as the best evidence that Mr. Taylor has.

Respectfully, under Rule 56(e) of the Federal Rules of Civil Procedure:

"When a motion for summary judgment is made and supported as provided in this rule, an adverse party may not rest upon the mere allegations or denials of his pleading, but his response, by affidavits or as otherwise provided in this rule, must set forth specific facts showing that there is a

genuine issue for trial. If he does not so respond, summary judgment, if appropriate, shall be entered against him."

In this case, we have Mr. Taylor under oath on February 6, 1984 in Amarillo indicating he has no specific factual basis that Attorney Pezzulli did anything wrong. Taylor has suspicion alone and no facts. He had the opportunity under oath to clarify his position but refused to be more specific because he simply had no facts to support his fears. He nevertheless turned around on April 16, 1984 and filed a Billion Dollar plus lawsuit against all the Defendants, and seeks damages of some Fifty Million Dollars plus from Attorney Pezzulli.

When Interrogatories are sent to him asking for information concerning this F.B.I. incident (Interrogatory Number Fourteen) seeking the facts in support of the claim; persons having knowledge in support of the claim; documents in support of the claim; and an identification of which Defendant allegedly called SMSC and who the "they" were that called back and allegedly made the false statements regarding the F.B.I. agent, we are simply referred back to the Complaint.

Attorneys for W. W. Taylor responded as follows:

"Answer for Nine through Twenty:

All reference to this matters are evidenced in the Complaint. Directing Defendants to these allegations, *I have plead with specificity in stating all knowledge that I have at this time and in addition, I have attached all documents that relate to these matters* that I have at this time to the best of my knowledge and belief. Upon receiving further information, I will gladly supplement these interrogatories."

Emphasis added.

Unquestionably, the answers are an effront to the Court; do not comply with Rule 56(e) of the Federal Rules of Civil

Procedure, and moreover, when they are taken against the backdrop of the deposition of Taylor on February 6, 1984 in Amarillo, (Exhibit 3 discussed above these) these answers indicate that Mr. Taylor did not, have a good faith basis under Rule 11, to the best of his knowledge, information and belief, formed after reasonable inquiry, to believe Pezzulli was guilty of anything. The suit is being pursued in violation of Rule 11 and the strongest possible sanction should be rendered by this Court immediately including summary judgment because of the lack of any material fact or dispute as a matter of law, and because of the calculated and willful discovery abuse contained in the responses which Taylor lodged flippantly referring the Court back to the Complaint and furnishing no specifics in a Billion Dollar plus lawsuit.

Only one additional item merits comment. The Interrogatories which were sent, from Interrogatories Number Nine through Twenty-Four, sought information concerning facts, documents, and witnesses for *each of the claims* against Hi-Plains and Welker, and derivatively against Pezzulli since he was included in all those claims. Almost four (4) months and hundreds of pages of documentation later, Taylor has yet to be specific about his claim. That is simply unfair.

Moreover, on July 2, 1984 a hearing was held in front of Magistrate Sanderson on a number of discovery motions including the specific discovery discussed above. By that time, one day previously, Taylor and SMSC had filed their "Answers" such as they are to the discovery which has been outlined above. At that very hearing, Magistrate Sanderson indicated to Attorney Palumbo for SMSC and Taylor that the answers to this discovery which were tendered were *not* in sufficient form and were not responsive to the discovery sought. Despite that fact, and despite the admonishment from the Magistrate, and despite the extension of time until July 30, 1984 to properly answer and properly respond to the discovery,

and despite the Court Order formally entered on August 1, 1984 requiring responses by July 30, 1984, Taylor and SMSC have filed nothing responsive to this discovery.

Such conduct is in direct violation of Rule 37(b)(2) which permits, among others, in part (C) thereof, the entry of an order dismissing the action and rendering judgment by default against the disobedient party, plus an award of attorney's fees.

Under Rule11, if a pleading is signed in violation of this rule, the Court upon motion, or upon its own initiative, shall impose the appropriate sanctions which may include reasonable expenses and a reasonable attorney's fee.

Under Rule 56(e), there is nothing before the Court to create any genuine issue of material fact; under Rule 37(b), Taylor has willfully refused to follow a court order; under Rule 11, he has obviously filed a suit in bad faith to knock Pezzulli out of the defense of claim involving Hi-Plains and Welker, and to cost him money as Defendant.

For these reasons, Attorney Pezzulli prays that summary judgment or default judgment be granted in his favor; that he be awarded costs and attorney's fees; and that the costs and attorney's fees be assessed personally against W. W. Taylor and SMSC for their egregious violations of Rule 11 in the filing of this suit.

CARRINGTON, COLEMAN, SLOMAN,
& BLUMENTHAL

/s/ CORBET F. BRYANT, JR.

CORBET F. BRYANT, JR.
2500 South Tower
Plaza of the Americas
Dallas, Texas 75201

Attorney for Defendant
Michael F. Pezzulli

CERTIFICATE OF SERVICE

This is to certify that a true and correct copy of the foregoing has this day been mailed, first class mailed, postage prepaid, to the following individuals:

Ms. Dorothy G. Palumbo
3905 Turtle Creek Blvd.
Dallas, Texas 75209

Mr. Richard Shore
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Mr. Stafford Hutchinson, AUSA
1100 Commerce, Room 16G28
Dallas, Texas 75242

Mr. James C. Todd,
Asst. Atty. General
P.O. Box 12548
Capitol Station
Austin, Texas 78711

Mr. Scott Oliver,
Kenneth Wagner,
and Ricardo Ortega
P.O. Box 1487
Albuquerque, N.M. 87102

Mr. Michael F. Pezzulli
701 Commerce, Suite 200
Dallas, Texas 75202

all this 16th day of August, 1984.

/s/ CORBET F. BRYANT, JR.
Corbet F. Bryant, Jr.

APPENDIX VI

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF TEXAS
DALLAS DIVISION

W. W. TAYLOR AND SOUTHWEST MORTGAGE SERVICE CORPORATION

vs.

FEDERAL HOME LOAN BANK BOARD, ET AL

Civil Action Number
CA 3-84-0578-G

PLAINTIFFS' COMBINED RESPONSE TO MICHAEL F. PEZZULLI'S MOTION FOR SUMMARY JUDGMENT AS TO ENTIRE CASE EXCEPT FOR PARAGRAPHS 46 AND 47 AND MOTION FOR SANCTIONS IN THE FORM OF ATTORNEYS' FEES

COME NOW, plaintiffs, Southwest Mortgage Service Corporation and W. W. Taylor, by and through their attorney and respectfully make and file this Response to Mr. Pezzulli's Motion for Partial Summary Judgment filed by Michael F. Pezzulli and Motion for Sanctions pursuant to F.R.C.P. 11. Out of respect for the Court's time and proclivity for patience, plaintiffs will not attempt to categorically refute each of Mr. Pezzulli's multifarious misstatements of fact, but will attempt to simplify this present dispute to its elementary components.

STATEMENT OF FACTS

Essentially, what Mr. Pezzulli seeks by his Motion for Summary judgment is the dismissal of the current action because plaintiffs have not filed supplemental responses to his interrogatories. Plaintiffs are more than willing to comply and furnish additional information that they have in support of their complaint.

However, at present, the parties are all subject to an order of this Honorable Court dated July 30, 1984, and rendered by Judge Fish which has effectively stayed all discovery indefinitely. This puts plaintiffs in a double bind: if they file supplemental answers to Mr. Pezzulli's interrogatories, they can be held in contempt for violating the court's order and if they do not file supplemental answers, by this present motion, Mr. Pezzulli seeks to have plaintiffs' entire action against him dismissed.

DISCUSSION OF LAW

A motion for summary judgment shall be granted only if the requirements of F.R.C.P. 56 (c) are fully met. "The third sentence of Rule 56 (c) provides for the immediate rendition of a judgment in the event that the matters considered by the court on a motion for summary judgment disclose 'that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law.' This provision, which is the very heart of the summary judgment procedure, demonstrates that the principal judicial inquiry required by Rule 56 is whether a genuine issue of material facts exists." Wright, Miller and Kane, Federal Practice and Procedure: @ 2725, p. 75.

"If there is a real factual dispute between the parties, relevant to a legal claim, then [the plaintiffs] must be afforded a trial." Ecology Center of Louisiana, Inc. v. Coleman, 515 F. 2d 860, 864 (5th Cir., 1975).

In a summary judgment proceeding, the test is not the preponderance of the evidence but whether a genuine issue of material fact remains after an examination of the pleadings, depositions, answers to interrogatories and admissions on file,

together with affidavits. Ransburg Electro-Coating Corp. v. Lansdale Finishers, Inc., 484 F. 2d 1037 (3d Cir., 1973).

In a summary judgment proceeding, the burden is on the movant to demonstrate "a right to judgment with such clarity as to leave no room for controversy and . . . show affirmatively that the opposing party cannot provail under any circumstance . . . 2725, p. 100.

"The thrust of all these formulations is the same. When applying the Rule 56 (c) standard, the court cannot summarily try the facts that have been established by the litigants' papers. Therefore, a party moving for summary judgment is not entitled to a judgment merely because the facts he offers appear more plausible than those tendered in opposition, or because it appears that the adversary [may be] unlikely to prevail at trial." Wright, Miller and Kane, Federal Practice and Procedure @ 2725, p. 104 and @ 2727; Hayden v. First National Bank of Mt. Pleasant, Texas, 595 F. 2d 994 (5th Cir., 1979).

All inferences to be drawn from the underlying facts must be viewed in the light most favorable to the party opposing the motion for summary judgment. U.S. v. Diebold, Inc., 369 U.S. 654, 82 S. Ct. 993, 8 L.Ed. 176 (1962). Bona fide factual disputes can not be resolved by affidavits. Hanley v. Chrysler Motors, 433 F. 2d 708 (10th Cir., 1970); their use is only relevant in determining whether a material issue of fact has been presented.

Plaintiff, W.W. Taylor is offering herewith an affidavit signed by him and reaffirming under oath that the allegations contained in the complaint are true and correct. Note that the affidavit is based on his "personal knowledge". Mr. Pezzulli's affidavit does not contain such an assurance and many of the assertions contained in Mr. Pezzulli's affidavit are merely conclusionary. These two points are highly significant.

It is well-settled that "conclusory statements and statements NOT MADE ON PERSONAL KNOWLEDGE do not comply with the requirements of F.R.C.P. 56 (c) and, therefore, may not be considered." (emphasis supplied). Union Insurance Society v. William Glucken & Co., 353 F. 2d 946 (2d Cir., 1965); Woods v. Concord Finance Corp., 373 F. 2d 733 (5th Cir., 1967).

"Thus, ultimate or conclusory facts and conclusions of law, as well as statements made on belief or on 'information and belief' cannot be utilized [as a basis for] a summary judgment motion." Wright, Miller and Kane, Federal Practice and Procedure @ 2738, p. 487-489; Automatic Radio Manufacturing Co. v. Hazeltine Research, Inc., 70 S. Ct. 894, 339 U.S. 827, 94 L. Ed. 1312 (1950).

In addition, "the granting of summary judgment will be held to be error when discovery is not yet completed." Wright, Miler and Kane, Federal Practice and Procedure @ 2741, p. 543; Parrish v. Board of Commissioners of the Alabama State Bar, 533 F. 2d 942 (5th Cir., 1976). Here, by order of Judge Fish, all discovery has been stayed until the federal defendants answer or otherwise plead. Since discovery has not been completed and many material facts which would establish the existence of the conspiracy to deprive plaintiffs of their constitutional rights are within the exclusive control of the defendants, the motion for the summary judgment is premature and improper.

The holding in Smith v. Community Federal Savings and Loan, 77 F.R.D. 668 (D.C. Miss., 1977) is directly on point. There, plaintiff's only explanation for not filing an opposing affidavit in response to defendant's summary judgment motion was his statement that the evidence necessary to establish the controverting facts was in the possession and control of defendant and that plaintiff could not ascertain those facts through

discovery because of a pending prohibition order. In Smith, the court correctly denied defendant's motion for summary judgment. See also: Walters v. City of Ocean Springs, 626 F. 2d 1317 (5th Cir., 1980); Wright, Miller and Kane, Federal Practice and Procedure @ 2741, p. 545.

CONCLUSION

Mr. Pezzulli's affidavit is not in conformity with the requirements of F.R.C.P. 56 (e) since he does not assert that the facts contained therein are based on his "personal knowledge" and also because it contains many conclusory allegations unsupported by facts. Therefore, the affidavit cannot form the basis upon which a summary judgment may be premised.

There are genuine issues of fact presented in the complaint and the truth thereof is reaffirmed by Mr. Taylor's attached affidavit. Specifically, there is a question concerning the existence or non-existence of a conspiracy tying the various defendants into a common scheme and thereby making each responsible for the overt acts of his co-conspirators. There are also genuine issues of fact regarding whether palintiffs' constitutionally protected rights were infringed. These issues cannot be disposed of without a trial and a legal determination on the merits.

The burden is on Mr. Pezzulli as the movant to establish that there is no genuine issue of material fact and that he is entitled to summary judgment as a matter of law. In plaintiffs' opinion, Mr. Pezzulli has failed to carry his burden.

Finally, because discovery has not been completed and has been stayed indefinitely, a motion for summary judgment at this time is premature and irregular.

MOTION FOR SANCTIONS IN THE FORM OF ATTORNEYS' FEES

Under Rule 11 of the Federal Rules of Civil Procedure, "the signature of an attorney or party [on a pleading] constitutes a certificate by him that he has read the pleading, motion that to the best of his knowledge, information and belief formed after reasonable inquiry it is well grounded in fact and IS WARRANTED BY EXISTING LAW . . . and that it is not interposed for any improper purpose, such as to harass or to cause unnecessary delay or needless increase in the cost of litigation." (emphasis supplied). The last sentence of the rule authorizes the court to impose sanctions in the form of reasonable attorneys' fees expended in defending against any improper motion.

Where movants are members of the legal profession and still stubbornly insist upon relief to which they are not entitled, their conduct is considered all the more reprehensible since they are charged with greater knowledge of the law than lay individuals. Analytica, Inc. v. NPD Research, Inc., 708 F.2d 1263 (7th Cir., 1983); see also: Lipsig v. National Student Marketing Corp., 663 F. 2d 178 (D.C. Cir., 1980); Overnite Transport Co. V. Chicago Industrial Tire Co., 697 F. 2d 789 (7th Cir., 1983); Alyeska Pipeline Co. v. Wilderness Society, 421 U.S. 240, 95 S. Ct. 1612, 44L. Ed. 2d 141 (1975).

The present motion for partial summary judgment asserted by Mr. Pezzulli, who is by trade an attorney, is premature and not asserted in conformity with the federal procedural rules. The movant asserted the motion in bad faith and in order to harass and cause plaintiffs to expend considerable sums in defense of the motion.

WHEREFORE, for all the reasons set out herein, plaintiffs respectfully request that Mr. Pezzulli's Motion for Partial Summary Judgment be denied and, in addition, seek sanctions

against Mr. Pezzulli in the form of reasonable attorneys' fees incurred in defending against the summary judgment motion.

Respectfully submitted,

/s/ MELODY S. FLECK

MELODY S. FLECK
3905 Turtle Creek Boulevard
Dallas, Texas 75061
(214) 522-7060

Attorney for Plaintiffs

CERTIFICATE OF CONFERENCE

The undersigned hereby certifies that Mr. Pezzulli's attorney of record was contacted with regard to the attached combined Response and Motion for Sanctions on August 27, 1984, and indicated that he would oppose our Motion for Sanctions.

/s/ DOROTHY G. PALUMBO

DOROTHY G. PALUMBO

CERTIFICATE OF SERVICE

This is to certify that a true and correct copy of the foregoing Response and Motion for Sanctions has this day been mailed by first class mail postage prepaid to the following:

CORBET F. BRYANT, JR.
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MR. SCOTT OLIVER,
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Albuquerque, N. M. 87102

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF TEXAS
DALLAS DIVISION

W. W. TAYLOR AND SOUTHWEST MORTGAGE SERVICE CORPORATION vs. FEDERAL HOME LOAN BANK BOARD, ET. AL.	Civil Action No. CA 3-84-0578-G

AFFIDAVIT OF W. W. TAYLOR

THE STATE OF TEXAS }
COUNTY OF DALLAS } ss

NOW COMES plaintiff, W. W. Taylor who is competent to testify as to the matters asserted herein and based on his personal knowledge asserts that all of the allegations contained in the original pro se complaint filed in the above-captioned action are true and correct.

W. W. TAYLOR
3905 Turtle Creek Boulevard
Dallas, Texas 75219

Subscribed and sworn to before me, on this 4th day of September, 1984.

Notary Public

My commission expires:
November 19, 1985

APPENDIX VII

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF TEXAS
DALLAS, DIVISION

W. W. TAYLOR, et. al.
Plaintiffs,

vs.
FEDERAL HOME LOAN BANK BOARD, et. al.
Defendants

Case No.
CA 3-84-0578-G

MOTION TO STAY DISPOSITION OF PENDING MOTIONS TO DISMISS UNTIL AFTER FULL DISCOVERY IS PERMITTED AND COMPLETED

TO THE HONORABLE JUDGE OF SAID COURT:

COME NOW, plaintiffs, W. W. Taylor and Southwest Mortgage Service Corp., by and through their attorneys of record, and make and file this Motion to Stay Disposition of defendants' pending motions to dismiss and for summary judgment until after full discovery is permitted and completed. In support thereof plaintiffs state the following:

1. The following Motions to Dismiss or for Summary Judgment are presently pending before the court:

a. Federal Employee Defendants' Motion to Dismiss and, in the Alternative Motion for Summary Judgment and Dismissal, filed 9-7-84;

b. Motion to Dismiss of the Defendants Federal Home Loan Bank Board and Federal Savings and Loan Insurance Corporation filed 9-7-84;

c. Joint Motion by Welker, Hi-Plains and Pezzulli for Partial Summary Judgment re: Paragraphs 46 and 47 of Complaint, filed 8-16-84;

d. Motion by Hi-Plains, Welker and Pezzulli to Dismiss Paragraphs 38, 40, 42, 43, 45, 46, 47, 50, 51, 52 for Lack of Subject Matter Jurisdiction and as Improper Pendent Claims, filed 8-16-84;

e. David Bonem, Fred Smith and John McKenzie's Motions to Dismiss for Lack of Jurisdiction, Insufficient Service of Process, Failure to State a Claim upon which Relief may be Granted, Prosecutorial Immunity and for a More Definite Statement, filed 7-13-84;

f. Ellen Souberman and Robert Wallace's Motions to Dismiss for Lack of Jurisdiction, Insufficient Service of Process, Failure to State a Claim upon which Relief may be Granted, Prosecutorial Immunity and for a More Definite Statement, filed 7-13-84;

g. Paul Bardacke's Motion to Dismiss for Lack of Jurisdiction, Insufficient Service of Process, Failure to State a Claim upon which Relief may be Granted and for a More Definite Statement, filed 7-13-84;

h. Snider Campbell, Christina Chavez, Andrew Swarthout, and Harold Douglas's Motions to Dismiss for Lack of Jurisdiction, Insufficient Service of Process, Failure to State a Claim upon which Relief may be Granted and for a More Definite Statement, filed 7-13-84;

2. By Order of Court dated July 30, 1984, and clarified by Order of Court dated September 6, 1984, discovery from the federal defendants has been stayed pending a ruling on the federal defendants' Motions to Dismiss;

3. Because of Magistrate Sanderson's misinterpretation of the Order of Court dated July 30, 1984, from August 1st (the date of the Magistrate's First Order Re: Discovery) until September 6th (the date of the Court's clarification order), no discovery was sought by any of the parties;

4. By Magistrate Sanderson's Order, dated October 25, 1984, plaintiffs are denied the right to conduct any discovery with respect to defendants Michael F. Pezzulli, T. L. Welker, and Hi-Plains Savings and Loan Association until after plaintiff W. W. Taylor's deposition delineates the parameters of the lawsuit (which in plaintiffs' view, denies plaintiffs the right to conduct meaningful discovery until after Mr. Taylor PROVES HIS CASE IN FULL during his deposition);

5. Plaintiffs have appealed the above-mentioned Order of the Magistrate because it unfairly limits discovery only as to plaintiffs while permitting defendants to engage in unbrideled discovery;

6. Despite Magistrate Sanderson's implication to the contrary, the allegations in plaintiffs' Complaint are more than adequate to satisfy F.R.C.P. 8(a)(2) which requires a pleading to contain a "short and plain statement of the claim showing that the pleader is entitled to relief" and need not be supplemented by Mr. Taylor's deposition before the relevancy of plaintiffs' discovery requests can be decided;

7. Important issues of fact have been raised in the defendants' sundry motions to dismiss and for summary judgment;

8. Resolution of these issues of fact must await further factual resolution through effective, BI-LATERAL discovery.

WHEREFORE, plaintiffs respectfully pray that this Honorable Court postpone disposition of the motions listed in paragraph #1 and any like motions until after plaintiffs have had an opportunity to engage in effective, meaningful discovery pursuant to the Federal Rules of Civil Procedure with all of the named defendants.

Respectfully submitted,

By: /s/ MELODY FLECK
MELODY FLECK
3905 Turtle Creek Boulevard
Dallas, Texas 75219
(214) 522-7060

/s/ DOROTHY G. PALUMBO
DOROTHY G. PALUMBO
Attorneys for Plaintiffs

CERTIFICATE OF CONFERENCE

Pursuant to Rule 5.1 of the Local Rules of Practice, plaintiffs' counsel contacted all attorneys of record prior to filing the attached motion. Corbet Bryant indicated that he would not oppose the stay if it was limited in time to 60 days. Richard Shore could not be contacted and, presumably, he would oppose the motion. The other attorneys indicated that they would oppose the motion.

/s/ DOROTHY PALUMBO
DOROTHY PALUMBO

CERTIFICATE OF SERVICE

The undersigned hereby certifies that on the 2nd day of November, 1984, true and correct copies of the foregoing motion and memorandum were served by United States Mail, postage prepaid, on the following:

DAVID MCCUE AND
MICHAEL PEZZULLI
701 Commerce, Suite 200
Dallas, Texas 75202

RICHARD SHORE
One Campbell Centre
Dallas, Texas 75206

STAFFORD HUTCHINSON, AUSA
1100 Commerce, Room 16G28
Dallas, Texas 75242

JAMES C. TODD,
ASST. A.G.
P.O. Box 12548
Capitol Station
Austin, Texas 78711

SCOTT OLIVER, KENNETH WAGNER
AND RICHARDO ORTEGA
P.O. Box 1487
Albuquerque, NM 87102

CORBET F. BRYANT, JR.
2500 South Tower
Plaza of the Americas
Dallas, Texas 75201.

/s/ DOROTHY PALUMBO
DOROTHY PALUMBO

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF TEXAS
DALLAS DIVISION

W. W. TAYLOR AND SOUTHWEST MORTGAGE SERVICE CORP.,

Plaintiffs

vs.

FEDERAL HOME LOAN BANK BOARD, ET., AL.,

Defendants

Case No. CA3-81-0578-G

MEMORANDUM IN SUPPORT OF PLAINTIFFS' MOTION TO STAY DISPOSITION OF THE PENDING MOTIONS TO DISMISS UNTIL AFTER FULL DISCOVERY IS PERMITTED AND COMPLETED

TO THE HONORABLE JUDGE OF THIS COURT:

COMES NOW, plaintiffs, W. W. Taylor and Southwest Mortgage Service Corp., by and through their attorney of record, and file this Memorandum in Support of their Motion to Stay Disposition of defendants' pending Motions to Dismiss and for Summary Judgment until full, bi-lateral discovery from all parties is permitted and completed.

Because of various orders and misinterpretations of orders, plaintiffs have been prohibited from engaging in effective discovery from the party defendants. Specifically, by Order of Court dated July 30, 1984, and clarified by Order of Court dated September 6, 1984, discovery from the federal defendants has been stayed pending a ruling on the federal defend-

ants' Motions to Dismiss. Because of Magistrate Sanderson's misinterpretation of the Order of Court dated July 30, 1984, no discovery was sought by any of the parties from August 1st (the date of the Magistrate's First Order Re: Discovery) until September 6th (the date of the Court's clarification order). By Magistrate Sanderson's latest Order, dated October 25th, plaintiffs are denied the right to conduct any discovery with respect to defendants Hi-Plains, Welker and Pezzulli until plaintiff W. W. Taylor's deposition delineates the parameters of the lawsuit.*

---

* Plaintiffs contend that this Order is contrary to the rules of civil procedure which permit liberal discovery of relevant facts. The Order, in effect, requires plaintiffs to prove the merits of their claims before they will be permitted to serve Interrogatories or Requests to Admit on or engage in any discovery from the named defendants.

Plaintiffs have already answered Interrogatories submitted by defendants and believe that the complaint, especially when supplemented with the answers to Interrogatories, is sufficient to apprise defendants of the claims against them and that the Magistrate should have ruled on the relevancy of plaintiffs' discovery requests.

F.R.C.P. 8 (a) (2) requires only that the complaint contain "a short and plain statement of the claim showing that the pleader is entitled to relief." The complaint here more than satisfies that minimal test and includes as much detail as the plaintiffs had access to when the complaint was drafted.

Despite the Magistrate's determination to the contrary, plaintiffs contend that the relevancy of plaintiffs' barred discovery requests can be readily determined from the complaint without further supplementation.

There are now a number of Motions to Dismiss pending before the Court.** These motions raise issues of fact concerning, inter alia, whether this Court has jurisdiction over the parties. These motions also seek dismissal of the complaint because plaintiffs have allegedly failed to supply specific factual details to support the general allegations contained in the complaint.

The information sought by plaintiffs in discovery and currently blocked is needed to establish jurisdiction over the nonresident defendants. Plaintiffs have alleged that the nonresidents have had conspiratorial contacts with the Texas-based defendants which constitutes an adequate basis for asserting jurisdiction. Through their currently frustrated discovery attempts, plaintiffs seek to gather specific factual details to support the general allegations of conspiracy which are contained in the complaint.

Information concerning the existence of a conspiracy, tying all of the defendants together and rendering each defendant personally liable for the acts of any other co-conspirator, is difficult to obtain except from the mouths and records of those who took part therein. Evidence concerning the existence of the conspiracy is almost exclusively within the control of the defendants and without effective discovery, the information will not voluntarily come to light.

Plaintiffs' blocked discovery requests sought information concerning the business interests and personal and social contacts of Mr. Pezzulli and Mr. Welker. This information is relevant or may lead to admissable information concerning the

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** A complete listing of defendants' pending Motions to Dismiss is included in grounds 1(a) through 1(h) of the accompanying motion.

lines of communication existing within the conspiracy and the non-resident defendants' contacts with the forum.

The conspiratorial links with the Texas defendants form the basis for asserting jurisdiction over the non-resident defendants, therefore, the following cases govern allowance or limiting of discovery.

Ordinarily, the Court has full discretion to permit or deny most types of discovery, however, jurisdictional discovery is not entirely discretionary.

In *Davis v. Asano Bussan Co.*, 212 F. 2d 558 (5th Cir., 1954), the fifth circuit held that plaintiff was entitled to discovery of disputed jurisdictional facts. (Interrogatories relevant to disputed jurisdictional facts were served on defendant and objections were filed; thereafter, the trial court dismissed the case for lack of jurisdiction. The circuit court reversed, holding that the district court should have received the complete information called for in the interrogatories before entering final judgment.)

As stated in *Eaton v. Dorchester Development, Inc.*, 692 F. 2d 727, 730 (11th Cir., 1982): "In the final analysis, a court does not have discretion to grant or deny a request for jurisdictional discovery [when jurisdictional facts are in dispute]. Rather, it is appropriate to speak in terms of a qualified 'right' to jurisdictional discovery when a court's jurisdiction is genuinely in dispute." (The eleventh circuit reversed the district court's dismissal of the complaint because scheduled depositions had not been taken.) In accord: *Investment Properties International, Ltd. v. Ios, Ltd.*, 459 F. 2d 705 (2d Cir., 1972). (Writ of mandamus granted directing judge to reverse order which denied plaintiff the right to depose opponent in order to establish standing and subject matter jurisdiction in federal district court.)

Similarly, in *Blanco v. Carigulf Lines*, 632 F. 2d 656 (5th Cir., 1980), the district court relied upon pleadings and party affidavits alone in making the subject matter jurisdiction determination. Reversing, the fifth circuit noted that defendant's answers to interrogatories were overdue and held that plaintiff was entitled to elicit material through discovery before a claim could be dismissed for lack of jurisdiction. See also: *Chatham Condominium Association v. Century Village, Inc.*, 597 F. 2d 1002, 1012 (5th Cir., 1979) ("dismissal for lack of subject matter jurisdiction prior to trial, and certainly prior to giving the plaintiff ample opportunity for discovery, should be granted sparingly"); *Williamson v. Tucker*, 645 F. 2d 404, 414 (5th Cir., 1981), cert. denied, 454 U.S. 897, 102 S. Ct. 396, 70 L. Ed. 2d 212 (1981) (prior to F.R.C.P. 12 (b) (1) dismissal when jurisdictional facts are in dispute, "the district court must give the plaintiff an opportunity for discovery and for a hearing that is appropriate to the nature of the moton to dismiss. Thus, some courts have refused to grant such a motion before plaintiff has had a chance to discover facts necessary to establish jurisdiction").

The argument against premature dismissal on 12 (b) (1) grounds is particularly strong when the basis of jurisdiction is also an element of plaintiff's cause of action on the merits as is the case here. The conspiracy allegations contained in the complaint serve as the basis for asserting jurisdiction over the non-resident defendants and is also part of plaintiffs' substantive claim. Thus the disputed juridictional issues are intertwined with the substantive merits, making it impossible to decide one without the other.

"The *Williamson* Court quoted extensively from *Bell v. Hood*, 327 U.S. 678, 66 S. Ct. 773, 90 L.Ed. 939 (1945) in support of the proposition that the 'Supreme Court has enumerated a strict standard for dismissals for lack of subject matter jurisdiction when the basis of the jurisdiction is also an element in

the plaintiff's federal cause of action.' 645 F. 2d at 415. In *Bell*, the Supreme Court stressed the difference between dismissal for lack of subject matter jurisdiction and dismissal for failure to state a claim upon which relief may be granted." *Eaton v. Dorchester Development, Inc.*, 692 F. 2d 727, 730 (11th Cir., 1982).

A Rule 12 (b) (1) motion allows the defendant to attack the truth and sufficiency of the matters alleged as well as the formal sufficiency of the complaint. If a 12 (b) (1) motion to dismiss attacks the sufficiency of the complaint on its face, then the reviewing court must consider the allegations in the plaintiff's complaint as true. If, however, the 12 (b) (1) motion to dismiss attacks the asserted factual basis of jurisdiction, information dehors the complaint may be considered and adequate discovery is a prerequisite to ruling on the motion.

Jurisdictional discovery calls for a balance of potentially conflicting interests. On the one hand, the defendant wants to avoid expending time, effort, and money in unnecessary discovery and the court should not be involved in a lawsuit unless it has jurisdiction. On the other hand, the plaintiff should be permitted to have his day in court and the intent of the federal rules (to permit full discovery of all relevant facts and facts which might lead to admissable evidence) should be honored. In order to balance these conflicting interests, "the protective measures suggested by Rule 26 (c) become significant, if not controlling." *Eaton*, supra. at 730. Rule 26 authorizes the court to tailor the scope of discovery to the relevant issues, thus shielding the defendant from oppression while still permitting the plaintiff to gather crucial relevant information.

Here, numerous motions seeking relief under Rule 26 have been filed, however, to date, there has been no tailoring of discovery to fit the particular issues involved in this lawsuit. At this juncture, plaintiffs are prohibited from seeking any infor-

mation from the federal defendants despite the fact that those defendants are, by way of affidavits, providing their one-sided view of the facts to the court. (See: affidavits attached to federal defendants' Motions to Dismiss.) By Magistrate Sanderson's latest set of orders, all discovery (by way of interrogatories, requests to admit and oral depositions) from Hi-Plains, Welker, and Pezzulli is barred until after W. W. Taylor, who has already answered Interrogatories, has been fully deposed. This type of one-sided discovery, i.e. only from the plaintiffs, is contrary to case law, the Federal Rules of Civil Procedure, and fair play.

Plaintiffs noticed a number of defendants for depositions during October and early November. By Magistrate Sanderson's latest order, all of those depositions have been vacated. As stated previously, to date, plaintiffs' discovery rights have not been recognized and only the defendants have been permitted to engage in any meaningful discovery. Plaintiffs genuinely believe that the complaint can be amended if necessary and more specific facts added thereto after discovery has been permitted and that the discovery will establish that this court has jurisdiction over the parties.

WHEREFORE, plaintiffs respectfully pray that this Honorable Court postpone disposition of defendants' pending motions to dismiss and for summary judgment and any like motions until after plaintiffs have had an opportunity to en-

gage in effective, meaningful discovery with all of the named defendants.

Respectfully submitted,

/s/ MELODY FLECK

MELODY FLECK
3905 Turtle Creek Boulevard
Dallas, Texas 75219
(214) 522-7060

/s/ DOROTHY PALUMBO

DOROTHY PALUMBO

Attorneys for Plaintiffs

CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing document was forwarded to all counsel of record on this 2nd day of November, 1984.

/s/ DOROTHY PALUMBO

Signed by Dorothy Palumbo

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF TEXAS
DALLAS DIVISION

W. W. TAYLOR AND SOUTHWEST MORTGAGE SERVICE CORP.

vs.

FEDERAL HOME LOAN BANK BOARD, ET AL

Civil Case Number CA3-81-0578-G

ORDER

IT IS HEREBY ORDERED that Defendant's Motion for Protective Order is denied in its entirety, defendants' objections are overruled, and sanctions are awarded to Plaintiffs.

Dated this day of November, 1984.

_____

Judge Presiding

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF TEXAS
DALLAS DIVISION

W. W. TAYLOR AND SOUTHWEST MORTGAGE SERVICE CORP.

Plaintiffs

vs.

FEDERAL HOME LOAN BANK BOARD, et al

Defendants

Civil Case Number
CA3-84-0578-G

MEMORANDUM IN SUPPORT OF PLAINTIFFS' MOTION TO STAY DISPOSITION OF THE PENDING MOTIONS TO DISMISS UNTIL AFTER FULL DISCOVERY IS PERMITTED AND COMPLETED

TO THE HONORABLE JUDGE OF THIS COURT:

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discovery was sought by any of the parties from August 1st (the date of the Magistrate's First Order Re: Discovery) until September 6th (the date of the Court's clarification order). By Magistrate Sanderson's latest Order, dated October 25th, plaintiffs are denied the right to conduct any discovery with respect to defendants Hi-Plains, Welker and Pezzulli until plaintiff W. W. Taylor's deposition delineates the parameters of the lawsuit.*

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parties. These motions also seek dismissal of the complaint because plaintiffs have allegedly failed to supply specific factual details to support the general allegations contained in the complaint.

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Condominium Association v. Century Village, Inc., 597 F. 2d 1002, 1012 (5th Cir., 1979) ("dismissal for lack of subject matter jurisdiction prior to trial, and certainly prior to giving the plaintiff ample opportunity for discovery, should be granted sparingly"); *Williamson v. Tucker*, 645 F. 2d 404, 414 (5th Cir., 1981), cert. denied, 454 U.S. 897, 102 S. Ct. 396, 70 L. Ed. 2d 212 (1981) (prior to F.R.C.P. 12(b)(1) dismissal when jurisdictional facts are in dispute, "the district court must give the plaintiff an opportunity for discovery and for a hearing that is appropriate to the nature of the moton to dismiss. Thus, some courts have refused to grant such a motion before plaintiff has had a chance to discover facts necessary to establish jurisdiction").

The argument against premature dismissal on 12(b)(1) grounds is particularly strong when the basis of jurisdiction is also an element of plaintiff's cause of action on the merits as is the case here. The conspiracy allegations contained in the complaint serve as the basis for asserting jurisdiction over the non-resident defendants and is also part of plaintiffs' substantive claim. Thus the disputed juridictional issues are intertained with the substantive merits, making it impossible to decide one without the other.

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Here, numerous motions seeking relief under Rule 26 have been filed, however, to date, there has been no tailoring of discovery to fit the particular issues involved in this lawsuit. At this juncture, plaintiffs are prohibited from seeking any information from the federal defendants despite the fact that those defendants are, by way of affidavits, providing their one-sided view of the facts to the court. (See: affidavits attached to federal defendants' Motions to Dismiss.) By Magistrate Sanderson's latest set of orders, all discovery (by way of interrogatories, requests to admit and oral depositions) from Hi-Plains, Welker, and Pezzulli is barred until after W. W. Taylor, who

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WHEREFORE, plaintiffs respectfully pray that this Honorable Court postpone disposition of defendants' pending motions to dismiss and for summary judgment and any like motions until after plaintiffs have had an opportunity to engage in effective, meaningful discovery with all of the named defendants.

Respectfully submitted,

/s/ MELODY FLECK
MELODY FLECK
3905 Turtle Creek Boulevard
Dallas. Texas 75219
(214) 522-7060

/s/ DOROTHY PALUMBO
DOROTHY PALUMBO

Attorneys for Plaintiffs

CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing document was forwarded to all counsel of record on this 2nd day of November, 1984.

/s/ DOROTHY PALUMBO
By Dorothy Palumbo

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF TEXAS
DALLAS DIVISION

W. W. TAYLOR AND SOUTHWEST MORTGAGE SERVICE CORP.,

vs.

FEDERAL HOME LOAN BANK BOARD, ET. AL.

Civil Action Number
CA 3-84-0578-G

MOTION FOR PROTECTIVE ORDER RE: DEPOSITIONS OF T. L. WELKER AND JOY BUNCH

TO THE HONORABLE JUDGE OF SAID COURT:

Pursuant to Rule 26(c) of the Federal Rules of Civil Procedure, the undersigned respectfully move for a protective order that the depositions of T. L. Welker, currently set for October 18, 1984, and the deposition of Joy Bunch, being set for October 19, 1984, not be taken at this time for the following reasons:

1. During the interim period while the law firm of Michael F. Pezzulli was disqualified, and pending reconsideration by this Honorable Court, and after the discovery bar was lifted SMSC and Taylor served various notices to take depositions including the deposition of T. L. Welker, set for October 18, 1984. Mr. Welker is the Chairman of the Board and Chief Executive Officer of Defendant Hi-Plains Savings and Loan Association;

2. Served on September 20, 1984, was a Notice to Take Deposition of Joy Bunch, Assistant Secretary and Treasurer of Hi-Plains Savings and Loan Association on October 19, 1984. The Court's Disqualification Order was removed by the

Order filed by the Honorable A. Joe Fish on September 27, 1984 and received by counsel on September 29, 1984. At that time, the law firm of Michael F. Pezzulli was reauthorized to enter the case and to pursue the discovery of W. W. Taylor by taking his deposition and conclude any outstanding discovery that Hi-Plains, Welker, or Pezzulli then had pending. See the Order of September 27, 1984;

3. There has been insufficient notice and time between the reentry of Pezzulli firm into the case after the lifting of the disqualification bar to adequately prepare for the depositions which are set of Mr. Welker and Ms. Bunch and, since the issue regarding the disqualification may be reurged by the Plaintiff following the deposition of Mr. Taylor, any discovery with respect to this case should first focus on the taking of the deposition of W. W. Taylor by Pezzulli, as ordered by the Court, and as earlier allowed by Magistrate Sanderson in his "First Order Re: Discovery" filed August 1, 1984;

4. T. L. Welker will not be in the State of Texas on the noticed dates as more fully appears from his affidavit attached hereto as Exhibit "C;"

5. True and correct copies of the Notices to Take Depositions and Request for Production of Documents are attached hereto respectively as Exhibits "A" and "B;"

6. As more fully appears from the attached Memorandum, made a part hereof, the discovery which is requested is clearly objectionable for the following reasons:

(a) The document request which is attached to each of the Notices to Take Depositions is unreasonably broad and oppressive;

(b) The documents that are requested are clearly irrelevant to any claim or defense in the litigation;

(c) The documents that are sought are documents which are totally independent of the present litigation and which bear no reasonable relationship to the Plaintiffs' alleged claim of damages;

(d) Federal law expressly prohibits the disclosure of some, if not most of the documents requested.

WHEREFORE, Hi-Plains and Joy Bunch pray that the above-styled depositions be cancelled until such time as the deposition of W. W. Taylor has been taken pursuant to the orders of Magistrate Sanderson, dated August 1, 1984, "First Order Re: Discovery," and further pursuant to this Honorable Court's ruling concerning the discovery necessary to finally resolve issues concerning disqualification as more fully appears in this Court's Order filed September 27, 1984, and entered by the Honorable A. Joe Fish.

Respectfully submitted,

MICHAEL F. PEZZULLI, P.C.

/s/ DAVID C. McCUE

DAVID C. McCUE
Attorney for T. L. Welker
and Hi-Plains
701 Commerce, Suite 200
Dallas, Texas 75202
(214) 742-4345

CERTIFICATE OF CONFERENCE

The undersigned spoke with counsel of record for SMSC and W. W. Taylor and they would not yield with respect to this motion.

/s/ DAVID C. McCUE

DAVID C. MCCUE

CERTIFICATE OF SERVICE

This is to certify that a true and correct copy of the foregoing has this day been hand delivered to:

Ms. Dorothy Palumbo
3905 Turtle Creek Blvd.
Dallas, Texas 75219

and mailed by first class mail to the following:

Mr. Richard Shore
One Campbell Centre
Dallas, Texas 75206

Mr. Stafford Hutchinson, AUSA
1100 Commerce, Room 16G28
Dallas, Texas 75242

Mr. James C. Todd,
Asst. Atty. General
P.O. Box 12548
Capitol Station
Austin, Texas 78711

Mr. Scott Oliver, Kenneth
Wagner and Ricardo Ortego
P.O. Box 1487
Albuquerque, N.M. 87102

MR. CORBET F. BRYANT, JR.
2500 South Tower
Plaza of the Americas
Dallas, Texas 75201

all this 11th day of October, 1984.

/s/ DAVID C. McCUE
DAVID C. McCUE

MEMORANDUM IN SUPPORT OF MOTION

T. L. Welker, Chairman of the Board and Chief Executive Officer of Hi-Plains Savings and Loan Association, has been noticed for his deposition as of October 18, 1984. The Order regarding disqualification was lifted by this Court on or about September 27, 1984. The time between September 27, 1984 when the Pezzulli firm was allowed to reenter the case, and the effective date of the noticing of the depositions of T. L. Welker, and Joy Bunch, was insufficient to adequately prepare for those depositions.

Moreover, the issues regarding the disqualification as per Judge Fish's Order of September 27, 1984 and Magistrate Sanderson's Order of August 1, 1984 are such that attorney Pezzulli has been given permission by this Court, and by Magistrate Sanderson, to conclude the deposition of W. W. Taylor, and to conclude any outstanding discovery by Hi-Plains to SMSC and Taylor at which time a final resolution concerning the order of disqualfication can be rendered. Entry of discovery on the merits, by Taylor and SMSC of Mr. Welker, or by Joy Bunch, Assistant Secretary of Hi-Plains Savings and Loan Association, would be totally premature at this time.

Moreover, the documents which are sought are clearly objectionable for four (4) reasons, These documents, as more fully appear from the attached Notices to Take Depositions, Exhibits "A" and "B" hereto, may be grouped into four (4) categories, all of which are objectionable.

CATEGORY I

DOCUMENT REQUEST IS TOO BROAD

T. L. Welker and Joy Bunch would show that such Request for Production of Documents at least initially does not comply with Rule 30(b)(5) and Rule 34(b), Federal Rules of Civil

Procedure, in that the Requests do not set forth the items to be inspected either by individual item or by category and do not describe each item in category with reasonable particularity. The Requests do not specify a reasonable time, place and manner of making the inspection and in performing the related acts other than T. L. Welker and Joy Bunch are to produce such documents less than thirty (30) days from the time that counsel for T. L. Welker and Joy Bunch received such Notice of Deposition.

T. L. Welker and Joy Bunch object to the Plaintiffs W. W. Taylor and Southwest Mortgage Service Corporation's Requests for the reason that the Requests are global and nonspecific to the point that the documents requested amount to a mere fishing expedition of any and all documents in the possession of T. L. Welker and Joy Bunch that may in any way relate to examinations of Hi-Plains Savings and Loan Association and all documents relating to correspondence with some 27 individuals and corporations, including individuals not parties to this litigation (Daniel F. Dean).

In *Lever Bros. Co. v. Procter & Gamble Mfg. Co.*, 38 F. Supp. 680 (D.C. Md. 1941), a request for a party to produce for inspection all written reports, memoranda or records of conferences of officers or members of the party's technical staff attended by a designated person in which certain processes were discussed was denied as too general. Similarly, in *Sonken-Galemba Corp. v. Atchison T. & S. F. Railway Co.*, 30 F. Supp. 936 (D.C. Mo. 1939), documents described in general language were not "designated" within Rule 34 providing for production of "designated" documents for inspection and copying or photographing.

Accordingly, T. L. Welker and Joy Bunch would request a Protective Order be entered, at least initially, by reason of the

global and all-encompassing nature of Plaintiffs' Request for Production of Documents.

CATEGORY II

SUBPOENA DUCES TECUM REQUESTS IRRELEVANT DOCUMENTATION

Without conceding that Plaintiffs have any right to depose T. L. Welker and Joy Bunch would specifically object to the documents requested by Plaintiffs from them on the grounds that they are totally irrelevant to any claim of Plaintiffs in the instant litigation.

Federal Rules of Civil Procedure, Rule 26(b), allows discovery of only those matters that are relevant to the subject matter of the pending cause of action. While the question is one of relevance, the primary issue for the Court is whether the documents and information requested relate to any legal or factual issue involved in the litigation. *Pierson v. United States*, 428 F. Supp. 384 (D.C. Del. 1977). *Smith v. FTC*, 403 F. Supp. 1000 (D.C. Del. 1975). Relevant information also includes that information which is reasonably calculated to lead to material that relates to an issue in the case. *Midland-Ross Corporation v. United Steel Workers of America*, 83 F.R.D. 426 (D.C. PA. 1979). However, discovery based on the hope that it will somehow produce or lead to relevant information should not be allowed. *Bottaro v. Hatton Associates*, 96 F.R.D. 158 (D.C. N.Y. 1982); *Apel v. Murphy*, 70 F.R.D. 651 (D.C. RI. 1976).

The documents Plaintiffs have requested to be produced in the subpoena duces tecum are documents that involve business dealings of Defendant Hi-Plains and T. L. Welker and presumably Joy Bunch. There is no showing that these documents would have any reasonable relation to the claims alleged by Plaintiffs in this cause of action. Essentially, Plaintiffs claim

that T. L. Welker and presumably Joy Bunch somehow, someway, invoked state action and violated their "civil rights." Documents relating to the examination of Hi-Plains Savings and Loan Association used to make the annual audit of Hi-Plains' accounts for the years 1982, 1983 and continuing to the present date have no bearing at all on the claims of these Plaintiffs.

Additionally, T. L. Welker and Joy Bunch would show that these documents are confidential business records of Defendant Hi-Plains and, accordingly, are protected and exempted from discovery. Rule 26(b), Federal Rules of Civil Procedure, specifically excepts from discovery privileged information. *Hearn v. Rhay*, 68 F.R.D. 574 (D.C. Wash. 1975). Therefore, even if the Court finds that some of the documents requested by Plaintiffs in this category are relevant to this cause of action, the materials should be protected from discovery due to their confidential nature. Confidential business information and personal privacy have been recognized by the Courts as protected by Rule 26(b). *Sanders v. Shell Oil Company*, 678 F.2d 614 (5th Cir. 1982). Relevant materials may be protected from discovery upon a proper claim of privilege by the party from whom such materials are sought. *Smith v. FTC, supra.* Such information may also be regarded as privileged due to a common law or statutory duty of confidentiality to third parties that prevents a party from disclosing the materials. *In Re: Candor Diamond Corporation*, 26 B.R. 847 (Bkrtcy. N.Y. 1983).

Accordingly, T. L. Welker and Joy Bunch would show that these documents have marginal relevance, if any, to the instant litigation and it would be damaging to Defendant Hi-Plains to have its personal privacy and their business records invaded. Accordingly, the Court should deem said documents undiscoverable.

CATEGORY III

SUBPOENA DUCES TECUM FURTHER REQUESTS DOCUMENTS TOTALLY INDEPENDENT OF THE INSTANT LITIGATION AND THAT BEAR NO RELATIONSHIP TO THE PLAINTIFFS' ALLEGED CLAIMS OF DAMAGES

In response to Plaintiffs' Request for Production of Documents served on Movants, Plaintiffs intend for T. L. Welker and Joy Bunch to produce the majority of Movant's and Hi-Plains' business records as they relate to Hi-Plains. It is apparent to T. L. Welker and Joy Bunch that Plaintiffs hope to obtain as many records as possible of the Movant's private and business dealings in hopes they can find something to substantiate any of the claims of Plaintiffs as to virtually all of the Defendants. While the discovery rules are to be liberally construed, an overly broad request for materials which constitutes no more than a "fishing expedition" should not be allowed. *Zahorik v. Cornell University*, 98 F.R.D. 27 (D.C. N.Y. 1983); *Isaac v. Shell Oil Company*, 83 F.R.D. 428 (D.C. Mich. 1979); *Strait v. Mehlenbacher*, 526 F. Supp 581 (D.C. N.Y. 1981); Parties should use discovery to gain the fullest possible knowledge of issues and facts in the case but should not be permitted to use discovery to determine whether unasserted claims for relief exist. *McLaughlin v. Copeland*, 455 F. Supp. 749 (D.C. Del. 1978), *aff'd*, 595 F.2d 1213 (3rd Cir. 1979).

At no time have Plaintiffs demonstrated any basis for the relevancy of all documents which they have requested and T. L. Welker and Joy Bunch would assert that even a general assertion of relevance by Plaintiffs is not sufficient to overcome the objections included herein. See *Home Insurance Company v. Ballenger Corp.*, 74 F.R.D. 93 (D.C. Ga. 1977). T. L. Welker and Joy Bunch request that this Court require Plaintiffs to

state specifically how the materials sought are relevant to their cause of action.

CATEGORY IV

FEDERAL LAW PROHIBITS THE DISCLOSURE OF SOME, IF NOT MOST OF THE DOCUMENTS REQUESTED

In the Request for Production of Documents attached to the deposition notice of T. L. Welker and Joy Bunch, the documents are sought:

1. Documents relating to the examination of Hi-Plains Savings and Loan Association for its annual audit;

2. Similar examination items for calendar years 1982 and 1983;

3. All documents relating to any communications between Hi-Plains and the Federal Home Loan Bank Board, the FSLIC, any agents or servants of those federal entities;

4. And finally, documents reflecting correspondence of any form for calendar year 1982 and 1983, to date, with, among others, the following specific people: William Churchill, supervisory agent for the Federal Home Loan Bank Board; Leonard McManaman, assistant district director of the Federal Home Loan Bank Board; William Capshaw, examiner for FSLIC; Gary Adams, examiner for FSLIC; Dorothy Nichols, attorney for the Federal Home Loan Bank Board; Rosemary Stewart, an enforcement officer for the Federal Home Loan Bank Board and/or FSLIC.

The documentation which is sought is clearly information which is not be disclosed without the express consent of the Federal Home Loan Bank Board pursuant to 12 C.F.R. § 505.5, among other pertinent provisions.

12 C.F.R. § 505 provides, among other pertinent provisions, that unless the information has been specifically authorized to be released by the Federal Home Loan Bank Board, or has been otherwise published in accordance with 12 C.F.R. § 505.3 (which is not applicable here), and the information is generally not available to the public, it will not be made available unless it is:

1. Exempt from disclosure by a statute or some executive order (the Plaintiffs have not carried the burden of proof in this regard at all);

2. The information is not disclosed if it is contained in or related to an examination, operating or condition reports prepared by, or on behalf of, or for the use of the Federal Home Loan Bank Board, and relates to the affairs of any member institution or affiliate thereof for such persons engaged in the savings and loan business. 12 C.F.R. § 505.5(a)(2). Precisely, that type of information is involved here in the report of examination with the Federal Home Loan Bank Board, Office of Examinations and supervision which report was conducted from approximately January 1983 through April 1983.

Moreover, that particular "report of examination" bears upon its face the following notations:

"Prohibition of disclosure or release.

This document is the property of the Federal Home Loan Bank Board and is furnished to the institution for its confidential use. Under no circumstances shall the institution, or any of its directors, officers or employees, disclose or make this document or any portion of its [sic] public in any manner."

Notification has been served upon the United States Attorney's Office with respect to the receipt of the Request for Production for T. L. Welker and Joy Bunch but to the extent that any such information is sought from Federal Home Loan Bank Board agents regarding any aspect of the examination or supervision of Hi-Plains Savings and Loan, it clearly is privileged information.

Additionally, under 12 C.F.R. § 505.5(a)(3), information is not required to be disclosed if it is privileged or related to the business, personal, or financial affairs of any person and is furnished in confidence. All or a portion of the information requested in the wide ranging Request for Production of Documents will undoubtedly involve personal information and financial information of T. L. Welker, Chairman and Chief Executive Officer of Hi-Plains Savings and Loan and Joy Bunch. Accordingly, without specific knowledge at this time, the undersigned, upon information and belief, believe that the documents which are sought in the Request for Production of Documents attached to the deposition notice of T. L. Welker and Joy Bunch certainly will contain business, personal, or other financial information which has been furnished to accountants in confidence and which should not otherwise be disclosed.

Finally, under 12 C.F.R. § 505.5(a)(4), information is likewise not to be published which is information contained in investigatory files compiled for law enforcement purposes including, but not limited to, information relating to the issuance of a cease and desist orders. In this particular case, as more fully appears from the Motions to Dismiss filed by the United States Government, and more specifically the "Motion to Dismiss of Defendants Federal Home Loan Bank Board and Federal Savings and Loan Insurance Corporation" filed between September 7, 1984 and September 10, 1984, and the alternative Motion for Summary Judgment filed by the same

Defendants, on or about September 7, 1984, it clearly appears that the Federal Home Loan Bank Board entered an Order, May 4, 1984, prohibiting W. W. Taylor from participating in the affairs of Hi-Plains Savings and Loan. See Exhibit A-1, A-2, and A-3 following the affidavit of Dorothy L. Nichols, attached to the Motion to Dismiss of Defendants Federal Home Loan Bank Board and Federal Savings and Loan Insurance Corporation, filed between September 7, 1984 and September 10, 1984. See also pages 4-6 of the Federal Agency Defendants' Memorandum of Points and Authorities. Finally, see Exhibit K, the Plaintiffs' own Complaint where, in a Order dated July 28, 1983, Taylor himself *agreed not to participate* in the affairs of Hi-Plains Savings and Loan pursuant to the consent order. This is a document dated July 28, 1983.*

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* What is especially annoying about the Taylor lawsuit is that Taylor, in his own Exhibit K filed as a part of the Complaint, agreed not to participate in Hi-Plains Savings and Loan Association's affairs. See Exhibit K, paragraph 2 "W. W. Taylor agrees not to participate in the conduct of the affairs of Hi-Plains Savings and Loan Association, . . . without obtaining the prior consent of the FSLIC.***" Nevertheless, Taylor has seen fit to file his Billion Dollar Lawsuit for facts which arise out of the original participation by Taylor with Hi-Plains Savings and Loan Association. Now that the Federal Defendants have filed their documentation and Taylor has filed his documentation, the appropriate documentation is before the Court to make a determination on the defense by Hi-Plains that administrative collateral estoppel by Taylor and SMSC prohibits him from proceeding further with his lawsuit since he obviously consented, voluntarily and knowingly, to cease participation in the affairs of Hi-Plains Savings and Loan Association. One can hardly complain of the conspiracy against Taylor (which does not exist) when he himself has agreed not to participate in the affairs of Hi-Plains. See the defense of administrative collateral estoppel raised as the "Seventh Defense" in the Defendant's Original Answer of Hi-Plains Savings and Loan Association filed May 17, 1984 before this Honorable Court. Nevertheless, Taylor persists in his discovery and

Because of this, and because of the clear language in 12 C.F.R. § 505.5(a)(4), any documentation that T. L. Welker and Joy Bunch may have which relates in any way to the cease and desist order levied upon Taylor directing him not to participate further in the affairs of Hi-Plains Savings and Loan Corporation would clearly be covered by the privilege contained in 12 C.F.R. § 505(a)(4).

For these reasons, it is crystal clear that the documentation sought by Plaintiffs in the Notice to Take Deposition of T. L. Welker and Joy Bunch are documents which are clearly privileged by law and not required to be produced.

As noted, a copy of our objection to this requested production of documents has been hand delivered to the United States Attorney as representative of district director of the Federal Home Loan Bank Board and further, the Court has been advised by virtue of this Memorandum in compliance with the following directive also appearing on the "report of examination" referred to above, as follows:

> "If a subpoena or other legal process is received: for production of this document, the district director — examinations should be notified immediately. The attorney at his instance the process was issued, and if necessary, the court which issued the process, should be advised of the above prohibition, and referred to part 505 of the general regulations of the Federal Home Loan Bank Board."

For these reasons, Request for Production of Documents attached to the Notice to Take Depositions of the T. L. Welker and Joy Bunch, paragraph 1, 2, 3, and 4 should be quashed in their entirety insofar as they relate in any way to anything regarding the Federal Home Loan Bank Board or the Federal

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attempts to castigate Hi-Plains, the Federal Home Loan Bank Board, and the FSLIC. This is completely improper.

Savings and Loan Insurance Corporation. The prohibition is explicit. 12 C.F.R. § 505.5(c). (The substance of which has been quoted above.)

In summary, T. L. Welker and Joy Bunch would show that the Plaintiffs, through their abusive discovery requests, are not truly seeking to advance their cause of action, but rather are merely seeking to obtain discovery in this case (remarkably similar to the same documents requested from virtually all other Defendants noticed) for their ongoing criminal litigation which is currently pending in New Mexico in a rather poorly disguised manner.

This Court should not condone such activity by these Plaintiffs and should grant this requested Protective Order and award T. L. Welker and Joy Bunch attorney's fees and costs.

Respectfully submitted,

MICHAEL F. PEZZULLI, P.C.

/s/ DAVID C. McCUE

DAVID C. McCUE
Attorney for T. L. Welker and
Hi-Plains
701 Commerce, Suite 200
Dallas, Texas 75202
(214) 742-4345

CERTIFICATE OF SERVICE

This is to certify that a true and correct copy of the foregoing has this day been hand delivered to:

MS. DOROTHY PALUMBO
3905 Turtle Creek Blvd.
Dallas, Texas 75219

and mailed by first class mail to the following:

MR. RICHARD SHORE
One Campbell Centre
Dallas, Texas 75206

MR. STAFFORD HUTCHINSON, AUSA
1100 Commerce, Room 16G28
Dallas, Texas 75242

MR. JAMES C. TODD,
Asst. Atty. General
P.O. Box 12548
Capitol Station
Austin, Texas 78711

MR. SCOTT OLIVER,
KENNETH WAGNER AND
RICARDO ORTEGO
P.O. Box 1487
Albuquerque, N.M. 87102

MR. CORBET F. BRYANT, JR.
2500 South Tower
Plaza of the Americas
Dallas, Texas 75201

all this 11 day of October, 1984.

/s/ DAVID C. McCUE
DAVID C. McCUE

AFFIDAVIT OF T. L. WELKER IN SUPPORT OF MOTION FOR PROTECTIVE ORDER

THE STATE OF TEXAS }
COUNTY OF DALLAS }

BEFORE ME, the undersigned authority, on this day personally appeared T. L. Welker, and being first duly sworn upon his oath deposes and says as follows:

1. My name is T. L. Welker, I am over the age of 18 years of age, have not been convicted of a felony, competent to make this Affidavit, and make the same upon personal knowledge of the facts contained therein;

2. I have received a Notice to Take My Deposition on October 18, 1984, and I am advised that one of the officers of our bank, Joy Bunch, has her deposition set for October 19, 1984;

3. I have longstanding plans to be outside the State of Texas and in the northeast, principally New York and Connecticut on October 18, 1984, and accordingly, I have not had thirty (30) days notice of the deposition nor a reasonable opportunity to cancel the plans made to appear for that deposition;

4. I have read the Motion for Protective Order filed by my attorneys, and believe that the documents which are requested which relate to the Federal Home Loan Bank Board, Federal Savings and Loan Insurance Corporation, and my personal financial information is neither relevant nor material to this case, and I agree with the position advocated by attorneys that the documents which are requested are privileged for the reasons set forth in their Memorandum;

5. That I have been informed that this Honorable Court has entered on Order on September 27, 1984 reinstating, temporarily, the law firm of Michael F. Pezzulli as my attorneys, and that is pending conclusion of the deposition of W. W. "Doc" Taylor, and any outstanding discovery from Hi-Plains and Welker to SMSC and Taylor;

6. That I genuinely believe that the efforts should be made toward resolving the disqualification at the earliest possible opportunity, in case new counsel is called into the case in order that a minimization of prejudice can occur and a minimization of delay in the case; in the alternative, should my counsel not be disqualified following the conclusion of the deposition of Mr. Taylor and the conclusion of outstanding discovery from Hi-Plains and Welker to SMSC and Taylor, then the case can proceed forward;

7. I personally believe that the Request for Production of Documents which has been attached to the Notice to Take Deposition is invasive of my constitutional right to privacy, my business records and personal financial privacy, and bears no reasonably relationship whatsoever to any of the charges allegedly made against me in the Complaint in this case. Accordingly, it is my position that the motion requesting all of this financial information is harassing and burdensome in addition to being protected by the Federal Home Loan Bank laws concerning non-disclosure of the documentation which my attorneys have described in the attached Memorandum.

FURTHER, THIS AFFIANT SAYETH NOT.

/s/ T. L. WELKER
T. L. WELKER

SUBSCRIBED AND SWORN TO BEFORE ME, on this the 11th day of October, 1984.

Signed by BETH A. PAYNE
Notary Public in and for
The State of Texas

My Commission Expires:
11-2-85

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF TEXAS
DALLAS DIVISION

W. W. TAYLOR, ET AL
vs.
FEDERAL HOME LOAN
BANK BOARD, ET AL

CA3-84-578-G

ORDER

IT IS ORDERED that the deposition of Charles Schmidt now scheduled for July 20, 1984, at 1:30 P.M. is stayed pending disposition of the Motion to Compel the Production of Documents by Charles Schmidt filed by Plaintiffs on July 19, 1984. A hearing on such Motion will be held on July 31, 1984, at 10:30 A.M. before Magistrate Sanderson in Room 16F17, 1100 Commerce, Dallas, Texas.

A copy of this order shall be transmitted to counsel for all parties and to Mr. Thomas S. Leatherbury, 3600 Republic Bank Tower, Dallas, Texas 75201.

ENTERED This 19th day of July, 1984.

Signed by JOHN B. COLE
United States Magistrate

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF TEXAS
DALLAS DIVISION

W. W. TAYLOR, ET. AL., *Plaintiffs* vs FEDERAL HOME LOAN BANK BOARD, ET. AL., *Defendants*	Civil Division No. 3-84-0578-G

NOTICE OF DEPOSITION

To the defendants in the above-captioned action and/or their attorneys of record:

Pursuant to Rules 26 and 30 of the Federal Rules of Civil Procedure, please take notice that on the 20th day of July, 1984, at 1:30 P.M., in the offices of Bright, Fuller and Associates, 708 Colorado Street, Suite 700, Austin, TX, Plaintiffs, W. W. Taylor and Southwest Mortgage Service Corporation, by and through their attorneys, will take the oral deposition of:

CHARLES D. SCHMIDT, Audit Partner
Touche Ross & Company
American Bank Tower
221 West Sixth Street
Austin, Texas

A subpoena duces tecum is hereby issued for CHARLES D. SCHMIDT to bring with him to the deposition the following documents, papers and writings:

1. The audit report of State Savings & Loan Association prepared by Touche Ross & Company and all preliminary drafts thereof.

2. Any directions given by the F.S.L.I.C. or the Federal Home Loan Bank Board to Touche Ross & Company regarding preparation of said report.

3. Documentation of any contract negotiations between the F.S.L.I.C. or the Federal Home Loan Bank Board and Touche Ross & Company pertaining to the preparation of said audit report.

4. Any written contract between the F.S.L.I.C. or the Federal Home Loan Bank Board and Touche Ross & Company pertaining to the preparation of said audit report.

5. All of the work papers prepared or used by Touche Ross & Company in conjunction with the audit of State Savings & Loan Association.

6. Copies of any inquiries made by Touche Ross & Company in order to verify any asset or liability of State Savings & Loan Association.

7. All communications between F.S.L.I.C. and/or the Federal Home Loan Bank Board and Touche Ross & Company relating to this audit.

Dated this 10th day of July, 1984.

Respectfully submitted,

/s/ DOROTHY PALUMBO

DOROTHY PALUMBO
Attorney for Plaintiffs
Southwest Mortgage Service Corp.
3905 Turtle Creek Blvd.
Dallas, TX 75219
(214) 522-7060

CERTIFICATE OF SERVICE

I do hereby certify that I have on this 11th day of July, 1984, served a copy of the foregoing pleading on counsel for all parties to this proceeding, by mailing the same by United States mail, properly addressed, and first class postage prepaid.

Signed By DOROTHY G. PALUMBO

APPENDIX VIII

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF TEXAS
DALLAS DIVISION

W. W. TAYLOR AND SOUTHWEST MORTGAGE SERVICE CORPORATION,
Plaintiffs.

vs.

FEDERAL HOME LOAN BANK BOARD, ET AL.,
Defendants.

Civil Action No.
CA 3-84-0578-G

ORDER

On this day came on to be heard the plaintiffs' motion to stay disposition of pending motions to dismiss until after full discovery is permitted and completed. The court, having considered such motion and the opposition thereto, is of the opinion that the motion should be **DENIED.**

SO ORDERED.

January 3, 1985.

/s/ A. JOE FISH
A. JOE FISH
United States District Judge

APPENDIX IX

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF TEXAS
DALLAS DIVISION

W. W. TAYLOR AND SOUTHWEST MORTGAGE SERVICE CORPORATION,
Plaintiffs,

vs.

FEDERAL HOME LOAN BANK BOARD, ET AL.,
Defendants.

Civil Action No.
CA 3-84-0578-G

MEMORANDUM ORDER

Came on for consideration the joint motion of T. L. Welker, Hi-Plains Savings and Loan Association, and Michael Pezzulli for partial summary judgment on paragraphs 46 and 47 of the complaint. For the reasons hereinafter stated, the court is of the opinion that the motion should be granted.

In regard to paragraph 46 the movants have submitted deposition testimony of Gerald Harris Stool, plaintiff W. W. Taylor's landlord, that Stool never received a communication from anyone, telephonically or otherwise, to the effect that Taylor had listed Stool's property as an asset on his financial statement. In opposition, the plaintiffs raise three arguments: (1) Stool's failure to sign the deposition renders its use "questionable," (2) Stool has controverted his own deposition testimony by admitting in a letter to Taylor that he indeed may have received the alleged telephone call, and (3) an affidavit of Taylor raises a credibility issue in that it states that Stool called Taylor and told him that an attorney from Hi-Plains had informed Stool that Taylor had listed the leased property as an asset on his corporate balance sheet. None of these arguments

suffice to show that there is a genuine issue of fact as to paragraph 46.

The first contention focuses on the question of whether the movants have properly supported their motion. The contention is simply wrong. Federal Rule of Civil Procedure 30(e) provides that if a deposition witness fails to sign the deposition within 30 days of receiving it, "the deposition may be used as fully as though signed."

The other two arguments focus on the question of whether the plaintiffs have supported their opposition to the motion with proper evidence to show that there is a genuine issue for trial. The second argument fails because the statement allegedly made in Stool's letter is hearsay not within any recognized exception to the hearsay rule. Rule 801(d)(2) of the Federal Rules of Evidence excludes admissions of a *party-opponent* from the definition of hearsay, but Stool is not a party to this case. Nor is the alleged statement in the letter admissible as a statement against pecuniary or proprietary interest under Federal Rule of Evidence 804(b)(3), since the statements in the letter, on the contrary, appear to have been motivated by a desire to maintain good landlord-tenant relations between Stool and Taylor. The third argument also fails. Taylor's affidavit as to the contents of a telephone call from Stool is inadmissible hearsay. Because the affidavit does not "set forth such facts as would be admissible in evidence," Fed. R. Civ. P. 56(e), the court may not consider it in determining whether the plaintiffs have adequately responded to the motion.

In regard to paragraph 47 the movants have submitted deposition testimony of Stephen English Smith, who at the time of the incidents alleged in the paragraph was Assistant Director of the Department of Housing and Neighborhood Services of the City of Dallas. They also have submitted records of the Department which, along with Smith's testi-

mony, show that the Department received an anonymous call reporting an illegal land use by Taylor at 3905 Turtle Creek Boulevard, Dallas, Texas. Smith's testimony indicates that the complaint was not false, that there was no harassment of the plaintiffs, and that the Department found that Taylor was in violation of the zoning regulations.

The response of the plaintiffs fails to controvert the motion with any evidence that Pezzulli or Welker made the complaint alleged in paragraph 47. Since the plaintiffs failed to submit admissible evidence that Pezzulli or Welker made the communication that was alleged to have been made to Stool in paragraph 46, the court cannot follow the plaintiff's suggestion and infer from that allegation that Pezzulli and Welker made the complaint alleged in paragraph 47.

The court finds that the movants have adequately supported the motion and that summary judgment is appropriate as to paragraphs 46 and 47 of the complaint because the plaintiffs have failed to respond with proper affidavits or other evidence indicating the existence of a genuine issue of fact. *See* Fed. R. Civ. P. 56(e). It is therefore ORDERED that the motion for partial summary judgment is GRANTED on the claims asserted in paragraphs 46 and 47 of the complaint.

January 7, 1985.

/s/ A. JOE FISH

A. JOE FISH
United States District Judge

APPENDIX X

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF TEXAS
DALLAS DIVISION

W. W. TAYLOR AND SOUTHWEST MORTGAGE SERVICE CORPORATION

Plaintiffs,

vs.

FEDERAL HOME LOAN BANK BOARD, ET AL.,

Defendants.

Civil Action No. CA 3-84-0578-G

MEMORANDUM ORDER

Defendant Michael F. Pezzulli moves for summary judgment on all claims in the complaint except those in paragraphs 46 and 47 thereof. In support of his motion Pezzulli has filed his personal affidavit refuting all allegations against him. In response, plaintiff W.W. Taylor has submitted an affidavit stating under oath that all of the allegations in the complaint are true.

The court finds that Pezzulli's affidavit properly supports his motion for summary judgment. *See* Fed. R. Civ. P. 56(e). The burden then falls on the plaintiffs as opposing parties to "set forth specific facts showing that there is a genuine issue for trial." *Id.* The Fifth Circuit has clarified that this rebuttal burden is one of producing " 'significant probative' evidence." Ferguson v. National Broadcasting Co., Inc., 584 F.2d 111, 114 (1978). Based on the following findings, the court is of the opinion that summary judgment should be granted in Pezzulli's favor.

1. The first sentence of paragraph 38 alleges that Pezzulli joined in a conspiracy with some of the other defendants. This statement fails to "set forth specific facts." Fed. R. Civ. P. 56(e). The rest of the allegations in the paragraph are based "upon information and belief" and are therefore not "made on personal knowledge." *Id.*

2. Paragraph 40 alleges in pertinent part that Pezzulli and defendant T.L. Welker, working individually and in conspiracy with the other defendants, harassed the plaintiffs in litigation in Amarillo, Texas, and that they have further harassed the plaintiffs by tortiously attempting to have the plaintiffs' fraud and forgery bond and credit default insurance cancelled. This allegation also fails to "set forth specific facts." *Id.*

3. Paragraph 42 alleges in pertinent part that Pezzulli and other defendants "committed [sic] a series of tortious acts," which are specified in subsequent paragraphs. This paragraph does not, by itself, "set forth specific facts." *Id.*

4. Paragraph 44 alleges that Pezzulli and defendant Welker "made harassing telephone calls to plaintiffs' Bonding Company and Credit Default Insurance Companies . . . ." There is no evidence on the record for the court to infer that Taylor's knowledge of these calls is based on anything but hearsay. Taylor has not shown that the allegation in paragraph 44 was "made on personal knowledge." *Id.*

5. Paragraph 45 alleges in its entirety "[t]hat Pezzulli and Welker even traveled to Virginia to harass one of plaintiff [sic] insurers by taking a lengthy deposition from them." This allegation fails to "set forth specific facts." *Id.*

6. Paragraph 50 alleges that Pezzulli and other defendants "contacted all of plaintiffs' customers and tried to get them to do business with them at Hi-Plains, and attempted

to get them to join in a suit to declare plaintiffs' insolvent, and encouraged, aided and abetted at least two Developers in filing suit against plaintiffs." These allegations, like the allegation in paragraph 44 (see paragraph 4 of this order), appear to be based on hearsay. In addition, the allegations do not "set forth specific facts." *Id.*

7. Paragraph 51 alleges that Pezzulli and other defendants knowingly filed against plaintiffs a false claim under the Racketeering Influenced and Corrupt Organizations Act. This paragraph fails to "set forth specific facts." *Id.* Summary judgment should be entered in Pezzulli's favor.

8. Paragraph 52 alleges that Pezzulli, acting individually and in conspiracy with other defendants, "caused to be originated" a television program that disseminated "mostly false information" about the plaintiffs with the intent to ruin the plaintiffs' business reputations and to put them out of business. This paragraph fails to "set forth specific facts." *Id.*

It is therefore **ORDERED** that Pezzulli's motion for summary judgment on all claims against him in the complaint except those in paragraphs 46 and 47 thereof is **GRANTED.**

Since this court has already granted summary judgment in Pezzulli's favor on paragraphs 46 and 47, there are no viable claims still pending against Pezzulli. The court determines that there is no just reason for delay in entering judgment. *See* Fed. R. Civ. P. 54(b). The court will therefore on this date enter judgment that the plaintiffs take nothing by this action against Pezzulli.

January 18, 1985.

/s/ A. JOE FISH

A. JOE FISH
United States District Judge

APPENDIX XI

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF TEXAS
DALLAS DIVISION

HI-PLAINS SAVINGS AND LOAN ASSOCIATION vs. W. W. TAYLOR AND SOUTHWEST MORTGAGE SERVICE CORPORATION	Civil Action Number CA3-85-1193D

MOTION TO STRIKE EXHIBIT "F" CONTAINED IN AFFIDAVIT OF DOROTHY PALUMBO

Hi-Plains Savings and Loan Association, Plaintiff in the above-styled civil action hereby moves to strike Exhibit "F" attached to the Affidavit of Dorothy Palumbo dated August 23, 1985, the deposition of Art Mueller for the following reasons:

1. The deposition of Arthur Mueller was taken in a case styled *Longview-St. James Plantation v. Southwest Mortgage Service Corporation*, formerly pending in state court in Louisiana in the Parish of St. James, 23rd Judicial District. That document shows conclusively that the deposition was taken on November 12, 1984.

2. Hi-Plains Savings and Loan Association was not even a party to that state court litigation on November 12, 1984. Hi-Plains had no notice of the existence of the taking of this motion, nor any awareness that the lawsuit was pending in the St. James Parish. The appearances noted in the deposition only include representatives only on behalf of the Defendant and representatives on behalf of the witness, and of course, Mr. Taylor himself. There was no representative there for the Plaintiff, Longview-St. James Plantation, and certainly no representative there on behalf of Hi-Plains

Savings and Loan Association. The attached letters rogatory do not show service upon Hi-Plains Savings and Loan Association or any representative thereof.

3. Hi-Plains Savings and Loan Association was not even brought into the lawsuit until December 24, 1984 when, upon the eve of trial, Taylor and SMSC filed a Third Party Complaint seeking to name virtually all the same people in the state court Louisiana case as Third Party Defendants, as they have previously named in the massive civil rights suits currently pending before The Honorable A. Joe Fish, United States District Judge, in Civil Action CA3-84-0578-G, *W. W. Taylor, et al v. Federal Home Loan Bank Board, et al.* After Hi-Plains was brought into the state court suit in Louisiana, the suit was removed to federal court in New Orleans, and thereafter, Hi-Plains was dismissed as a party Defendant by an order entered by The Honorable Peter Bier, United States District Judge for the Eastern District of Louisiana on July 24, 1985. A true copy of that dismissal order is attached hereto, made a part hereof, and incorporated as Exhibit 1.

4. The filing of this deposition and its use in this case is strenously opposed. First, there is no identity of parties between the two civil actions in which the depositions are sought to be taken. As noted, Hi-Plains was not even a party at the time the deposition was taken, and was thereafter dismissed following the removal to federal court. There is not an identity of issues between the two civil actions which is sufficiently similar in order to allow the deposition of Mueller to be proferred. The Longview-St. James case was a direct action by a developer against SMSC for clouding title to its real estate. Taylor and SMSC attempted to drag in all the Dallas Defendants that are sued in Judge Fish's massive civil rights case, but were unsuccessful.

5. Accordingly, Defendants have failed to prove any identity between the issues pending in the present RICO action and the issues pending before the Louisiana state court. No one from Hi-Plains Savings and Loan Association was ever notified to appear or to attend those depositions. Finally, nothing prevents the use of the deposition of Mr. Mueller in accordance with the Fed. R. Evid., for impeachment purposes, or otherwise, if appropriate good cause is shown. Should Mr. Mueller be redeposed, or testify live at trial, and should there truly be some relevant evidence contained in his deposition, it can be offered in the usual manner through direct examination or cross-examination and impeachment if necessary through the use of a prior statement of a deponent under oath.

WHEREFORE, Hi-Plains prays that Exhibit "F" attached to the Affidavit of Dorothy Palumbo, the oral deposition of Arthur Mueller, be excluded from consideration by this Court with respect to the Motion to Dismiss pending by Defendants,

or for any other use other than those specifically allowed by the F.R.C.P. or the Fed. R. Evid. in an unrelated civil action.

Respectfully submitted,

MICHAEL F. PEZZULLI, P.C.

/s/ MICHAEL F. PEZZULLI

MICHAEL F. PEZZULLI
BAR CARD NO. 15881900
4514 Cole Avenue, Suite 1200
Dallas, Texas 75205
(214) 742-1200

/s/ DAVID C. McCUE

DAVID C. McCUE
Bar Card No. 13494100
4514 Cole Avenue, Suite 1200
Dallas, Texas 75205
(214) 742-1200

Attorneys for Plaintiff
Hi-Plains Savings and Loan Assoc.

CERTIFICATE OF CONFERENCE

The undersigned hereby certifies that he contacted attorney Dorothy Palumbo on October 15, 1985 at 10:20 a.m. and she opposes this Motion to Strike.

/s/ DAVID C. McCUE
DAVID C. McCUE

CERTIFICATE OF SERVICE

The undersigned certifies that a true and correct copy of the foregoing Motion to Strike was sent to the following persons by Certified Mail, Return Receipt Requested, this 10 day of October, 1985:

DOROTHY PALUMBO
2902 Carlisle, Suite 105
Dallas, Texas 75204

STAFFORD HUTCHINSON
Assistant U.S. Attorney
1100 Commerce Street
Dallas, Texas 75242

JAMES C. TODD
Asst. Attorney General
P.O. Box 12548,
Capitol Station
Austin, Texas 78711

JAMES T. LANTELME,
Attorney
Federal Home Loan Bank
Board
Office of the General
Counsel
1700 G. Street N.W.
Washington, D.C. 20552

/s/ DAVID C. McCUE
DAVID C. McCUE

LONG, BURNER & COTTEN
Attorneys at Law
P.O. Box 2212 707 West 7th Street
Austin, Texas 78768

512/474-1587

December 12, 1985

Re: No. 85-3436 — Southwest Mortgage Service Corporation vs. Great Plains Insurance Company — In the 116th Judicial District Court of Dallas County, Texas

The Honorable Fred Harless
Judge of the 116th District Court
Dallas County Courthouse
600 Commerce Street
Dallas, Texas 75202

Dear Judge Harless:

I have received a photocopy of a Request for Findings of Fact and Conclusions of Law filed on behalf of the plaintiff in the above-referenced case. It is my position that the Court is under no obligation to enter such findings or conclusions.

Texas Rules of Civil Procedure and case law support this position. As required by Rule 296, a request for findings of fact and conclusions of law must be submitted within ten (10) days after the final judgment is signed. Here, counsel for the plaintiff did not file the request until December 3, 1985, fifteen (15) days after the Order Abating Case was signed on November 18, 1985.

In addition, Rule 385 specifically states that in appeals from interlocutory orders, the trial judge *need not* file findings of fact and conclusions of law, but may do so within thirty (30) days after judgment is signed.

Moreover, the Court is not required to make findings on facts which are undisputed. In the instant case the plaintiff failed to present any evidence raising fact questions. See *Jackman v. Jackman* (Civ.App. 1976) 533 S.W.2d 361.

Given the fact that plaintiff's Request for Findings of Fact and Conclusion of Law was not timely filed and that the Court is under no obligation to enter findings of fact and conclusions of law, I would urge the Court not to prepare such findings. However, if the Court desires to file such findings, I will submit a draft for the Court's review. Please contact me if the Court desires to have such a draft.

Respectfully submitted,

/s/ RUSTY SEALY
RUSTY SEALY
For the Firm

RS/lj
Enclosures

cc:
Ms. Reva Knight
Mr. Mike Pezzulli
Mr. Michael F. Pezzulli
Mr. James C. Todd

MICHAEL F. PEZZULLI
A Professional Corporation
Attorneys and Counselors at Law
Highland Park National Bank Building
4514 Cole Avenue, Suite 1200
Dallas, Texas 75205
214-742-1200

October 17, 1985

The Honorable Robert D. Hill
Judge, United States District Court
for the Northern District of Texas
1100 Commerce Street
Dallas, Texas 75242

Re: Hi-Plains Savings and Loan v.
W. W. Taylor and Southwest
Mortgage Service Corporation
No. CA3-85-1193-D

Dear Judge Hill:

On October 15, 1985 we submitted our Opposition to the Motion to Dismiss. We have noted two typographical errors and one possible content error and would like to clarify those briefly with apologies. These are:

1. *U.S. v. Uvalde* is incorrectly cited. It should be 625 F.2d 547 with a rehearing denied at 629 F.2d 1350.

2. *Bennett v. Berg* is correctly cited as 685 F.2d commencing at page 1053 rather than 1063.

3. Finally, insofar as James Gentry's side deal with Doc Taylor was concerned, Gentry's arrangement was for 50% of the profit of Taylor's 50%, or in other words, Taylor got 25% of the profit from Hi-Plains and Gentry got 25% of the profit from Hi-Plains. The 25% and 50% may not have been stated

quite as clearly in the brief as it could have been to accurately reflect what the arrangement was between Gentry and Taylor.

We regret any inconvenience and hope these clarifications will be of some assistance to the Court.

Respectfully,

/s/ DAVID C. McCUE
DAVID C. McCUE

DCM/EL
cc: MS. DOROTHY PALUMBO
MR. JAMES C. TODD
MR. STAFFORD FERGUSON
MR. JAMES LANTELME

MICHAEL F. PEZZULLI
A Professional Corporation
Attorneys and Counselors at Law
Highland Park National Bank Building
4514 Cole Avenue, Suite 1200
Dallas, Texas 75205
214-742-1200

October 9, 1985

Ms. Reva Knight
2902 Carlisle, Suite 105
Dallas, Texas 75204

Re: SMSC v. Great Plains
No. 85-3436

Dear Ms. Knight:

I have received your Motion to Strike our Plea in Intervention on behalf of Hi-Plains Savings and Loan Association which has a blank Fiat in it. Confirming our telephone conversation on October 9th, it is my understanding that you will furnish us with advance notice of when the hearing on that Motion is to be held.

This will confirm that I am departing the law firm on November 1, 1985, and because of my familiarity with the lawsuit, I would like to schedule the hearing at some time before that time if at all possible. I look forward to hearing from you.

Sincerely,

/s/ DAVID C. McCUE

DAVID C. McCUE

DCM/el
CERTIFIED MAIL
RETURN RECEIPT REQUESTED
cc: Clerk, 116th District Court
Mr. James C. Todd
Mr. Rusty Sealey

THE ATTORNEY GENERAL
OF TEXAS

Jim Mattox
Attorney General

December 11, 1985

Ms. Nancy Hall Doherty, Clerk
U.S. District Court, Dallas Division
Northern District of Texas
1100 Commerce, Room 15C22
Dallas, Texas 75242

Re: *W.W. Taylor and Southwest Mortgage Service Corporation v. Federal Home Loan Bank Board, et al.*, Civil Action No. 3-84-0578G

Dear Ms. Doherty:

Enclosed please find the original and two copies of STATE DEFENDANTS' MOTION FOR SANCTIONS UNDER RULES 26(g) and 37(d) in the above referenced and numbered cause.

Please file stamp one of the enclosed copies and return it to me for my files. I have sent a copy of the above mentioned documents to all interested parties.

Thank you for your cooperation in these matters. If you have any questions, please feel free to contact me.

Sincerely,

/s/ JAMES C. TODD
James C. Todd
Assistant Attorney General
State & County Affairs

JCT:mcm

Enclosures

cc: Reva L. Knight
Stafford Hutchison
Scott Oliver
H. Earl Hall, Jr.
Michael F. Pezzulli
Corbet F. Bryant
Russ Oliver

MICHAEL F. PEZZULLI
A Professional Corporation
Attorneys and Counselors at Law
Highland Park National Bank Building
4514 Cole Avenue, Suite 1200
Dallas, Texas 75205
214-742-1200

November 20, 1985

Ms. Reva Knight
2902 Carlisle, Suite 1200
Dallas, Texas 75205

Re: Hi-Plains v. SMSC
No. CA3-85-1193-D

Dear Reva:

Enclosed please find the following documents which have this day been filed in the above referenced cause:

1. Plaintiff's Response to Defendants' Interrogatories; and

2. Plaintiff's Response to Defendants' Request for Production of Documents.

Very truly yours,

/s/ MICHAEL F. PEZZULLI
MICHAEL F. PEZZULLI

MFP/el
Enclosure
BY HAND DELIVERY
cc: Mr. James C. Todd
Mr. Stafford Hutchinson
Mr. James Lantelme

MICHAEL F. PEZZULLI
A Professional Corporation
Attorneys and Counselors at Law
Highland Park National Bank Building
4514 Cole Avenue, Suite 1200
Dallas, Texas 75205
214-742-1200

October 25, 1985

William E. Palmer
Bobby Pringle
Dorothy Palumbo
Reva Knight
2902 Carlisle, Suite 105
Dallas, Texas 75204

Re: SMSC v. Hi-Plains, Welker,
and Pezzulli
Cause No. CA3-85-1193-D

Dear Ladies and Gentlemen:

Enclosed please find a letter to Magistrate Sanderson and an proposed order which is self-explanatory.

When the various promissory notes are produced at Hi-Plains Savings and Loan Association, we do not expect there to be any further contact or attempted contact with the promissory note holders making payments to Hi-Plains Savings and Loan Association unless and until the 116th District Court allows it pursuant to express Court order. You people have twice lost an injunctive effort to secure the collateral and the Dallas Court of Appeals has affirmed Judge Harless' ruling.

In the event we are incorrect you certainly have an adequate remedy at law for damages in the civil rights case pending in

Judge Fish's Court. Any further attempted contact with the promissory note makers at Hi-Plains Savings and Loan Association will be dealt with appropriately in the 116th District Court by a Motion for Contempt.

I pass this on to you not as a threat of course, but to make it abundantly clear that further efforts to contact our notemakers will not be tolerated.

Please convey this message to Mr. Taylor and anyone else in authority at SMSC.

Very truly yours,

/s/ DAVID C. McCUE
DAVID C. McCUE

DCM/el
Enclosure
BY HAND DELIVERY
cc: Mr. James C. Todd

RECEIVED BY: _____ DATE: _____

(2)

No. 85-1166

Supreme Court, U.S.
FILED
FEB 21 1986
JOSEPH F. SPANIOL, JR.
CLERK

In The

Supreme Court of the United States

January Term, 1986

W. W. TAYLOR and
SOUTHWEST MORTGAGE SERVICE CORP.
Petitioner,

vs.

MICHAEL F. PEZZULLI,
Respondent.

FEDERAL HOME LOAN BANK BOARD,
FEDERAL SAVINGS AND LOAN INSURANCE CORPORATION,
WILLIAM CHURCHILL, LEONARD F. MCMANAMAN,
WILLIAM CAPSHAW, GARY ADAMS,
DOROTHY NICHOLS, ROSEMARY STEWART,
L. L. BOWMAN, E. FRANK HALL,
T. L. WELKER, SNIDER CAMPBELL,
CHRISTINA CHAVEZ, HAROLD DOUGLAS,
RAYMOND D. CHAVEZ, ANDREW SWARTHOUT,
DAVID W. BONEM, ROBERT WALLACE,
JOHN MCKINZIE, PAUL BARDACKE,
ELLEN SOUBERMAN, FRED SMITH,
SUN COUNTRY SAVINGS BANK,
LAS CRUCES, NEW MEXICO,
HI-PLAINS SAVINGS AND LOAN ASSOCIATION,
HEREFORD, TEXAS AND
JOHN DOES AND JANE DOES
numbered one through fifty
Other Defendants.

BRIEF IN OPPOSITION

CORBET F. BRYANT, JR.
CARRINGTON, COLEMAN, SLOMAN
& BLUMENTHAL
2500 South Tower
Plaza of the Americas
Dallas, Texas 75201
(214) 698-8000

19pp

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No. 85-1166

In The

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January Term, 1986

W. W. TAYLOR and
SOUTHWEST MORTGAGE SERVICE CORP.
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vs.

MICHAEL F. PEZZULLI,
Respondent.

FEDERAL HOME LOAN BANK BOARD,
FEDERAL SAVINGS AND LOAN INSURANCE CORPORATION,
WILLIAM CHURCHILL, LEONARD F. MCMANAMAN,
WILLIAM CAPSHAW, GARY ADAMS,
DOROTHY NICHOLS, ROSEMARY STEWART,
L. L. BOWMAN, E. FRANK HALL,
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CHRISTINA CHAVEZ, HAROLD DOUGLAS,
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HI-PLAINS SAVINGS AND LOAN ASSOCIATION,
HEREFORD, TEXAS AND
JOHN DOES AND JANE DOES
numbered one through fifty
Other Defendants.

BRIEF IN OPPOSITION

LISTING OF PARENT AND SUBSIDIARY CORPORATIONS

Respondent Michael F. Pezzulli is a natural person and has no parent or subsidiary corporations.

STATUTES AND RULES INVOLVED

FED. R. CIV. P. 56(f) provides as follows in pertinent part:

> **(f) When Affidavits are Unavailable.** Should it appear from the affidavits of a party opposing the motion that he cannot for reasons stated present by affidavits the facts essential to justify his opposition, the court may refuse the application for judgment or may order a continuance to permit affidavits to be obtained or depositions to be taken or discovery to be had or may make such other order as is just.

STATEMENT OF THE CASE

On April 16, 1984, Petitioners filed this suit against 75 named and unnamed defendants, seeking damages in excess of $1 billion for an alleged conspiracy to deprive the Petitioners of their civil rights in connection with the ownership take-over of Hi-Plains Savings and Loan by Defendant T. L. Welker. Respondent Pezzulli was an attorney who represented Hi-Plains after it was taken over by Welker. Four months after the filing of the Complaint, Respondent Pezzulli filed his Motion for Summary Judgment as to paragraphs 46 and 47 of the Complaint, and shortly thereafter filed an additional Motion for Summary Judgment as to the balance of the Complaint against him. Pursuant to Federal Rule of Civil Procedure 54(b), a Final Judgment was signed on January 18, 1985, providing that Petitioners take nothing against Respondent Pezzulli.

During the course of the suit, Petitioners sought to take certain discovery against various defendants which the defendants alleged was improper. After considering Motions for Protective Orders and Motions to Quash filed by the defendants involved, the Magistrate prohibited Petitioners from taking the requested discovery *from the defendants*. At no time did the District Court order a stay of "all of the petitioners' discovery" as alleged in the Petition. Some of these discovery orders were appealed to the District Court by Petitioners, but after due consideration the District Judge sustained the Magistrate and prohibited the requested discovery for good cause. The merits of the various discovery orders are no longer being contested and are not part of the Petition.

For approximately a one month period during the nine months from the filing of the Complaint to the entry of summary judgment in favor of Respondent Pezzulli, the Magistrate mistakenly stayed all discovery through a misinterpretation of one of the District Court's discovery orders, but during the balance of the eight months, Petitioners could take unlimited discovery from third parties. Petitioners did not, however, take the deposition of any non-party witness either as general discovery or for use in connection with their Response to the Motions for Summary Judgment. Instead, Petitioners sought to quash notices of depositions of two non-party witnesses whose testimony bore on certain of their claims in paragraphs 46 and 47 of the Complaint.

SUMMARY OF ARGUMENT

Petitioners' allege they were prevented from developing facts sufficient to controvert Pezzulli's Motion for Summary Judgment by the trial court's actions in staying certain discovery sought by Petitioners and by ruling on the summary judgment motion in spite of Petitioners' request for more time to take discovery. Under Rule 56(f) of the Federal Rules of

Civil Procedure, the trial court has discretion to overrule or delay consideration of a summary judgment motion when such allegations are made. The standard of review of the trial court's actions is whether the court abused its discretion. Under the circumstances of this case, the trial court's actions were not an abuse of discretion and do not depart so far from the "usual and accepted course of judicial proceedings" to warrant review on a writ of certiorari.

Rule 56(f) expressly required Petitioners in this situation to describe their specific needs for additional discovery in an affidavit. They did not. Nor were any of Petitioners' unsworn motions or arguments detailed as to the nature of the discovery needed or why controverting facts could only be developed by taking the specific discovery which had previously been stayed by the trial court. By law, Petitioners' unsworn, vague allegations of the need for more discovery are insufficient to require a trial court to overrule or stay consideration of a summary judgment motion.

The authorities cited by Petitioners do not hold, as Petitioners claim, that mere unsworn allegations of the need for further discovery from a non-movant prohibit a court, on constitutional grounds, from granting summary judgment. At most, such authority recognizes a court's discretionary powers in extraordinary cases to dispense with the formalities of a Rule 56(f) affidavit when the facts of the case justify its actions. This does not mean, however, that its refusal to do so constitutes an abuse of discretion or violates due process.

Petitioners cite various opinions of different circuit courts relating to this area of discovery law, but fail to explain how or in what way such opinions are allegedly in conflict, and a review of such opinions discloses no conflict between the circuits.

Petitioners purport to raise a due process claim in their Petition, but this claim was never raised in the courts below

and is improperly raised for the first time in the Petition. In addition, Petitioners wholly fail to argue the merits of their due process claim in the body of the Petition and fail to cite any authority explaining or supporting their claim, leaving this argument so undeveloped as to amount to no argument at all.

Petitioners also purport to put the merits of the summary judgment in issue, but fail to argue this point in the body of their Petition, fail to identify the fact issues they allege exist, and fail to attach crucial portions of the summary judgment record such as their own Complaint or the second Pezzulli Affidavit in support of the motion, which prevents even a cursory review of the summary judgment. Both the District Court and Fifth Circuit reviewed the entire record and rejected Petitioners' arguments.

Petitioners finally attempt to bolster the existing summary judgment record by attaching various documents to their Petition as Appendix XI. This attempt to alter the existing summary judgment record after the fact is improper. In any event, the documents reveal on their face that they did not even exist until nine months after summary judgment was granted. The documents themselves are merely pleadings and routine correspondence relating to the case below or to pending state court litigation between the parties and do nothing to prove an alleged prior conspiracy to violate Petitioners' civil rights.

ARGUMENT AND AUTHORITIES

The gist of the Petition is that the District Court erred when it overruled Petitioners' request that it delay or deny consideration of Pezzulli's Motion for Summary Judgment because Petitioners desired to take additional discovery. The standard of review for such claims is whether the District Court abused its discretion. *Walters v. City of Ocean Springs*, 626 F.2d 1317 (5th Cir. 1980); *Wallace v. Brownell Pontiac-GMC Co.*, 703 F.2d

525 (11th Cir. 1983). Under this standard the Petition fails to raise substantive issues requiring review on a writ of certiorari.

Petitioners allege they were unable to respond to Pezzulli's Motion for Summary Judgment because the court's prior discovery orders had prevented them from taking the discovery needed to develop controverting facts. The Federal Rules state specifically the obligations of Petitioners in such a case:

> **When Affidavits are unavailable.** Should it appear from the affidavits of a party opposing the motion [for summary judgment] that he cannot for reasons stated present by affidavit facts essential to justify his opposition, the court may refuse the application for a judgment or may order a continuance to permit affidavits to be obtained or depositions to be taken or discovery to be had or may make such other order as is just.

FED. R. CIV. P. 56(f). It is undisputed that Petitioners failed to file an affidavit of their inability to present facts opposing the motion for summary judgment. Under the rules, this alone is enough to uphold the trial court's actions and deny review on a writ of certiorari.

Petitioners argue that the circumstances of this case, including the trial court's previous stay of certain discovery sought by Petitioners and the filing by Petitioners of an unsworn motion to continue consideration of pending *motions to dismiss* based on their desire to take more discovery, *required* the District Court to exercise its discretion and overrule or delay consideration of the motion in spite of Petitioners' failure to file a Rule 56(f) affidavit. This argument begs the question of whether such stay of discovery in fact prevented Petitioners from raising facts sufficient to oppose the motion, and requires the Court to assume that any stay of discovery would have this effect. This Court has expressly rejected this type of argument. *First National Bank v. Cities Service Company*, 391 U.S. 253, 290 (1968) (rejecting allegations that Plaintiffs may get

to a jury merely "on the basis of the allegations of their complaints, coupled with the hope that something can be developed at trial in the way of evidence to support those allegations ... .").

Petitioners have an affirmative duty under the rules to explain in detail to the trial court, in an affidavit, exactly what facts are involved, how and why they may be learned only by taking the requested discovery, and the steps Petitioners have taken to raise fact issues from other sources — in general, why the court should exercise its *discretion* to overrule or continue the motion. FED. R. CIV. P. 56(f) *See generally* 10 A. Wright, Miller & Kane, Federal Practice and Procedure: Civil 2d §2741, p. 548 (1983) (requirements of Rule 56(f) provide a court with "a method of checking on the bona fides of the party opposing summary judgment and also might give it some indication whether a genuine fact issue is likely ever to be developed").

In this case Petitioners gave the trial court absolutely no details as to how its discovery orders hampered their ability to respond to the summary judgment motion. In their Response to the motion, Petitioners made only the following conclusory allegation:

> Since discovery has not been completed and many material facts which would establish the existence of the conspiracy to deprive Plaintiffs of their constitutional rights are within the exclusive control of the Defendants, the motion for the summary judgment is premature and improper.

Plaintiffs' Combined Response to Michael F. Pezzulli's Motion for Summary Judgment as to Entire Case Except for Paragraphs 46 and 47 and Motion for Sanctions in the Form of Attorneys' Fees, *reprinted in* Petition, Appendix VI, p. 4. Petitioners also filed an unsworn motion to stay consideration of pending motions to dismiss, which is reprinted in the

Petition as Appendix VII-1, where they again failed to state any specifics regarding the need for a stay. Such bare assertions that some unspecified discovery may turn up unspecified material facts do nothing to guide the trial court's decision and are unpersuasive in themselves. It was therefore not an abuse of discretion for the trial court, which had made the original discovery rulings for good cause, to overrule the request that summary judgment not be granted until that same discovery was taken.

Even if Petitioners' pleadings had been specific, the trial court would still be within its discretion in overruling the motion to stay because Petitioners failed to explain in detail why they were unable to gather facts from other sources not covered by the discovery orders, including their own testimony. Until Petitioners showed that there was some harm or prejudice from not taking the stayed discovery, it was not an abuse of discretion to deny the motion to stay and consider the merits of the summary judgment. *See* 10 A. Wright, Miller & Kane, Federal Practice and Procedure: Civil 2d §2741, pp. 548 *et. seq.* (1983) (discussing requirement that a party state what steps he has taken to obtain access to the relevant evidence). Nowhere in any documents filed in the trial court did Petitioners allege or prove that the stayed discovery was the only way to develop controverting facts.

Petitioners' argument amounts to a request for the exercise of two-fold discretion by the trial judge. First, Petitioners allege the trial court should have exercised its discretion to consider their unsworn motions regarding the need for more discovery in spite of the requirement of Rule 56(f) that such claim be made by affidavit and, second, that after considering their unsworn allegations, the trial court should have exercised its discretion and granted their request to overrule or delay consideration of the summary judgment motion. Only if the

trial court abused its discretion in both decisions may the judgment be overruled.

In support of their arguments that the trial court's actions were improper, Petitioners misrepresent the Fifth Circuit opinion in *John v. Louisiana (Board of Trustees)*, 757 F.2d 698 (5th Cir. 1985). On page 12 of their Petition, Petitioners imply that *John* establishes a rule that summary judgment will be reversed if the non-movant has indicated to the trial court in an unsworn "letter" that he desires to take more discovery and present additional evidence before the ruling on summary judgment. According to Petitioners, "the Fifth Circuit made no requirement for an affidavit from the non-moving party." Petition, p. 12. In fact, the *John* opinion states no such rule. The letter to the court was referred to in the opinion solely to decide the applicable standard of review. Specifically, the parties in *John* had agreed early in the case that it would be resolved on cross motions for summary judgment, based on the testimony previously given at the preliminary injunction hearing as supplemented by the scheduled deposition of a Mr. Molina. The anticipated schedule subsequently broke down and Plaintiff's counsel wrote a letter to the court stating that he felt summary judgment was no longer proper, that a trial would be necessary, and that he wished to bring forth additional evidence at the trial. The defendant, however, pursued its planned Motion for Summary Judgment which was granted by the trial court. On appeal, the Fifth Circuit initially faced the question of the standard of review. If the parties had agreed to a trial on a "stipulated record," the standard of review would not be as great and the judgment could be upheld even if disputed fact issues were found. On the other hand, if the judgment was a true summary judgment, the existence of fact issues would require a reversal. The Fifth Circuit recited the circumstances of the agreement and letter to the court and held that even if the original agreement would support an inference that judgment was based on a trial on stipulated

facts, the letter to the court was sufficient to repudiate the agreement, causing the judgment to be a true summary judgment and subject to the stricter standard of review. The letter to the trial court was discussed only in deciding the standard of review. On the merits, the opinion discloses no argument by appellants that summary judgment was improper due to a lack of discovery, and nowhere in the opinion does the court discuss the standards of Rule 56(f) or whether an unsworn "letter" to the court is sufficient to preserve error. The Fifth Circuit reversed the summary judgment, but the stated reasons for doing so involved the existence of disputed fact issues in the *existing* record and its rejection of the trial court's granting of a "default" summary judgment when the Plaintiff failed to file a response. Nothing in the *John* opinion indicates that the reversal had anything whatsoever to do with the need for further discovery.

Similarly, the other Fifth Circuit opinion cited by Petitioners, *Walters v. City of Ocean Springs*, 626 F.2d 1317 (5th Cir. 1980), does not hold that Rule 56(f) may be dispensed with, because apparently the non-movant in that case did file an affidavit. ("We assume *arguendo* that Walters' motion met the formal requirements of Rule 56(f), and that *his Rule 56(f) affidavit* alleged with sufficient particularly the controverting facts he expected to adduce . . ."). 626 F.2d at 1321 (emphasis added).

The only opinion cited by Petitioners which recognizes a court's right to waive the requirements of Rule 56(f) is the district court opinion in *Smith v. Community Federal Savings & Loan*, 77 F.R.D. 668 (N. D. Miss. 1977), where the court noted that there are "occasions when" literal compliance with Rule 56(f) may be overlooked, citing *Littlejohn v. Shell Oil Co.*, 483 F.2d 1140 (5th Cir. 1973), *cert. denied*, 414 U.S. 1116 (1974). Assuming the *Smith* and *Littlejohn* courts are correct in their view that Rule 56(f) may be waived, which is questionable, the

mere recognization of a court's discretionary powers to overlook procedural formalities is a far cry from Petitioners' request that a court be *required* to deny or delay summary judgment any time vague, unsworn allegations are made that further discovery "may" turn up facts sufficient to rebut the motion. As discussed above, this theory has been expressly rejected by this Court. *First National Bank v. Cities Service Company*, 391 U.S. 253, 290 (1968).

In an attempt to make their cause more appealing, Petitioners imply that the trial court and Court of Appeals holdings required them to file a Rule 56(f) affidavit simply to notify the trial court of the obvious fact that certain discovery had been stayed. According to Petitioners, the Fifth Circuit denied their appeal citing their failure to file an affidavit *"stating that their discovery had been cut off . . . ."* Petition, p. 11. (emphasis added). Petitioners say they are "incredulous that Petitioners would be required to make an affidavit to the District Court that it, and its magistrate, *had cut off the discovery*, especially since those relevant orders of the magistrate had been appealed to the District Court who affirmed the stay of Petitioners' discovery." *Id.* (emphasis added).

Petitioners' argument mischaracterizes the actual holding of the Fifth Circuit. The opinion in fact held that Petitioner erred in failing to submit an affidavit that "he was *foreclosed by* [the] discovery order from presenting 'facts essential to justify his opposition.' . . . the non-movant 'may not simply rely on vague assertions that additional discovery will produce needed but unspecified facts' [citations omitted] ". *Taylor v. Federal Home Loan Bank Board*, no. 85-1067 (5th Cir. July 1, 1985), *reprinted in* Petition, Appendix I-1, 5 (emphasis added). Contrary to Petitioners' representations, the Fifth Circuit did not base its decision on their failure to inform the District Court formally of the mere existence of the discovery orders but on their failure to explain specifically *if* and *how* such discovery

orders foreclosed them from developing facts necessary to oppose the motion for summary judgment.

Petitioners also cite cases from various circuits which observe that continuances should routinely be granted under Rule 56(f) where the moving party has "sole possession of the relevant facts." Petition, p. 13, citing *Hebert v. Wicklund*, 744 F.2d 218 (1st Cir. 1984). Such cases on their face are inapplicable to Petitioners' claim herein because Petitioners do not allege that the moving party, Pezzulli, had "sole possession of the relevant facts." Indeed, Petitioners' claims involved allegations that Pezzulli conspired with 74 other named and unnamed defendants to deprive Petitioners of their civil rights. Petitioners have argued all the way through this case that even if Pezzulli did not personally commit any of the alleged acts, as shown by his summary judgment affidavits, he would still be liable as a co-conspirator. In addition, Petitioners alleged that the conspirators made certain false and defamatory statements to Petitioners' landlord, business associates, and the Zoning Department of the City of Dallas, Texas in order to injure Petitioners. This case is therefore the opposite of one where the movant has "sole possession of the relevant facts" because, by definition, the relevant facts would also be in the possession of 74 other named and unnamed defendants, as well as such third party witnesses as Petitioners' business associates, landlord, and the Dallas zoning officials. (A zoning department official was deposed. He denied any knowledge of a false complaint made by any defendant, and said the anonymous complaint that was made to the department was valid.) In addition, the opinions cited by Petitioners state only general principles of law and do not purport to establish a strict rule that continuances must always be granted in such situations, much less when the non-movant fails to allege specifically what relevant facts are in the sole possession of the movant.

Petitioners allege broadly that the above-cited case law reveals that the Circuit Courts are in disagreement "as to this area of the discovery and summary judgment law, and that the Fifth Circuit at times appears not to agree with its own prior rulings." Petition, p. 14. A review of the cases cited, however, reveals no such disagreement among the circuits and reveals that Petitioners are the only ones to whom the Fifth Circuit appears to be inconsistent.

Petitioners purport to raise a due process claim in their Petition. This claim was never raised in the District Court or the Court of Appeals, however, and is therefore not a proper subject for review on certiorari. *See Berkemer v. McCarty*, 104 S. Ct. 3138 (1984) (Supreme Court may, but is reluctant to, consider issue not raised in courts below). In any event, the due process claim is virtually ignored in the body of the Petition, and Petitioners do not cite a single case supporting or explaining their due process claim. The only reference to due process in the Argument and Authorities section of the Petition is a single conclusory sentence on page 14, which is unsupported, unpersuasive, and amounts to virtually no argument at all.

Petitioners also purport to put the merits of the summary judgment in issue by including it in their "Questions Presented." Once again, however, Petitioners fail to address this issue at all in the body of their Petition (except as discussed below). They fail to even identify the fact issues which they allege exist in the summary judgment record, and fail to attach crucial portions of the summary judgment record such as their own Complaint or the second Pezzulli Affidavit in support of his motion for summary judgment, preventing even a cursory review of the complete summary judgment record. By failing to address this issue, Petitioners have abandoned any claim that the summary judgment was unsupported by the record. *Fehlhaber v. Fehlhaber*, 681 F.2d 1015, 1030 (5th Cir. 1982), *cert denied*, 464 U.S. 818 (1983) (failure to brief and

argue an issue is grounds for finding it has been abandoned). *See also Hershinow v. Bonamarte*, 735 F.2d 264, 266 (7th Cir. 1984) (court will not consider claim presented in perfunctory and undeveloped manner in brief). This Brief will not attempt to reargue the merits of the summary judgment. Respondent merely notes that both the District Court and Court of Appeals fully considered the matter and felt summary judgment was warranted.

Petitioners attempt to bolster the summary judgment record by attaching various documents to their Petition as Appendix XI, even though such documents were not on file at the time judgment was rendered. Petitioners go so far as to proclaim that "*Appendix XI constitutes Petitioners' proof.* Had these letters and pleadings been available to Petitioners at the time of summary judgment, Petitioners could have used them as evidence of the conspiracy." Petition, p. 15 (emphasis added).

The purported "proof" attached as Appendix XI is improper and of no avail for several reasons. First, as a matter of law, a non-movant cannot attack a summary judgment on appeal by introducing new evidence to buttress the existing summary judgment record. *John v. Louisiana (Board of Trustees)*, 757 F.2d 698, 710-11 (5th Cir. 1985). Second, the alleged "proof" contained in Appendix XI is meaningless. Appendix XI consists of seven documents dated between October and December, 1985, over nine months after the summary judgments at issue had been granted in January, 1985. Petitioners are apparently claiming that documents that were not even in existence when summary judgment was granted somehow justify a reversal on the merits after the fact. This claim is too ludicrous to be addressed further.

The documents themselves do absolutely nothing to support a claim of conspiracy to violate Petitioners' civil rights. The first document is a motion to strike an exhibit attached to an affidavit of Petitioners' attorney, which was filed in the case

below subsequent to the time Pezzulli was dismissed on summary judgment. It has nothing to do with a conspiracy. It was signed by Respondent Pezzulli as attorney of record for Hi-Plains Savings & Loan Association, which is still a party in the case below, and indicates on its face that it was served on Dorothy Palumbo, attorney of record for Petitioners, as required by the Federal Rules. The second document is a letter from one of the attorneys in pending state court litigation regarding a request for findings of fact and conclusions of law. Again, this letter has nothing to do with a secret conspiracy to violate Petitioners' civil rights. Nor was the document itself secret, because it indicates on its face that it was copied to Reva Knight, another attorney for Petitioners. The third document in Appendix XI is a letter to the court in the case below regarding typographical errors in a previously filed Motion to Dismiss. Again, nothing is stated therein relating in any way to a secret conspiracy to violate Petitioners' civil rights, and a copy of such document was apparently served on attorneys for Petitioners. Document four of Appendix XI is a letter to Petitioners' counsel acknowledging receipt of their motion to strike in the pending state court litigation. What this letter has to do with a conspiracy is frankly a mystery to Respondents. Document five is a transmittal letter filing a Motion for Sanctions by one of the remaining defendants in the case below. Document six is a transmittal letter transmitting discovery documents to Petitioners' attorneys in the state court litigation. Document seven is a letter to Petitioners' attorneys warning them not to attempt to violate a court order in the pending state litigation. Every single one of these documents is either a pleading, a transmittal letter, or routine correspondence relating to pending civil lawsuits. Every single one of these documents indicates on its face that it was either mailed to or copied to Petitioners' own counsel. Petitioners fail to explain why these documents were attached to their Petition, how these late 1985 documents relate in any way

to an alleged 1983-84 conspiracy, and why Petitioners feel that Pezzulli's actions in serving copies of pleadings and correspondence on other attorneys of record as required by the Federal Rules constitutes evidence of a conspiracy. Appendix XI is a farce, and, since it admittedly "constitutes Petitioners' proof," Appendix XI argues strongly that the Petition itself is also a farce.

CONCLUSION

Respondent respectfully prays that Petitioners' Petition for Writ of Certiorari be in all things denied.

Respectfully submitted,

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CERTIFICATE OF SERVICE

The undersigned hereby certifies that this Brief in Opposition has been delivered and served on the following: William E. Palmer, Esq., Reva Knight, 2902 Carlisle, Suite 105, Dallas, Texas 75204, Attorneys for Petitioners.